



Annual Report for FY 2015

February 29, 2016

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Foreword

In accordance with section 1206 of Title 5, United States Code (U.S.C.), the U.S. Merit Systems Protection Board (MSPB) submits this annual report on its significant actions during fiscal year (FY) 2015.

We invite customers and stakeholders to send comments to improve the MSPB Annual Report to:

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Information about MSPB's FY 2015 program performance results (as required under the Government Performance and Results Act Modernization Act) is available in the Annual Performance Report and Annual Performance Plan (APR-APP) for FY 2015-2017. Financial accountability and audit information is included in MSPB's Annual Financial Report (AFR) for FY 2015. MSPB's Annual Reports, AFRs, APR-APPs, and Strategic Plans are posted on MSPB's website, www.mspb.gov, when they are released.

Go to www.mspb.gov to learn more about MSPB's work, sign up for our adjudication or studies listservs, follow us on twitter ([@USMSPB](https://twitter.com/USMSPB)), or download the MSPB app (for Android or iPhone).

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U.S. MERIT SYSTEMS PROTECTION BOARD

FISCAL YEAR 2015 ANNUAL REPORT

MESSAGE FROM THE CHAIRMAN

I am pleased to submit this Annual Report of the significant actions of the U.S. Merit Systems Protection Board (MSPB) for Fiscal Year (FY) 2015. The last few years have been both the most challenging in MSPB's history and among the most rewarding. Between FY 2012-2015, MSPB issued decisions in 61,019 cases, including initial appeals and PFR decisions issued in FY 2014 and FY 2015 for approximately 32,770 furlough cases.¹

I am proud to report that as of January 31, 2016, we have completed adjudication of approximately 97% of these furlough initial appeals. Even with the unprecedented number of decisions issued in 2014 and 2015, the percent of MSPB's decisions left unchanged by the Courts remained steady at 96 percent for both years. In 2015, MSPB completed the revision to its adjudication regulations, a process that began in FY 2011. We also increased the number of mediators available in the Mediation Appeals Program (MAP), which allows this option for resolving disputes available to more interested parties and for the disputes to be resolved faster. More information about MSPB's adjudication activities in 2015, including summaries of significant decisions, are included in this report.

In FY 2015, MSPB issued three study reports: *Veterans' Employment Redress Laws in the Federal Civil Service*; *The Impact of Recruitment Strategy on Fair and Open Competition for Federal Jobs*; and *What is Due Process in Federal Civil Service Employment*. In addition, MSPB completed its studies research agenda for FY 2015-2018, planned administration of the 2016 Merit Principles Survey and published three newsletter editions and four online articles, including one timely article on adverse actions. Summaries of these reports, and one report issued in early FY 2016 on Senior Executive Service (SES) training, and other studies activities are included in this Annual Report.

These results reflect the dedication, expertise, and commitment of MSPB's employees. Despite the challenges we have faced in the last few years, MSPB's 2015 Federal Employee Viewpoint Survey (FEVS) results improved markedly. The percent of positive responses increased for almost every question on the survey, including those related to perceptions of supervisors and managers. MSPB ranked 8th—and was 2nd most improved—in employee engagement compared to other small agencies. In addition, MSPB was ranked 8th in 2015 and was the 5th most improved among small agencies in the Best Places to Work (BPTW) Rankings released by the Partnership for Public Service in December 2015.

Implementation of the Veterans Access, Choice, and Accountability Act of 2014 has already affected MSPB. This law gives the Secretary of the Department of Veterans Affairs (VA) more flexibility in removing or demoting VA SES personnel and changes the way MSPB processes VA SES appeals. The law stipulates that the MSPB Administrative Judge (AJ) must issue a decision on a VA SES case within 21 days of the filing of the appeal with MSPB. In addition, the decision issued by the AJ is final, with no additional appeal or review permitted by the Presidentially appointed and Senate confirmed Board Members at headquarters, or by the Courts. This is a review right afforded to other Federal executives and employees guaranteed by Federal statute and legal precedent. In our experience with the VA SES cases we have received so far, the MSPB AJs assigned to the case, and often a team of other MSPB legal staff members, have had to delay other adjudication work in order

¹ In FY 2013, MSPB received more than 32,400 furlough appeals as a result of governmentwide sequestration.

to meet the strict 21-day deadline. On May 13, 2015, I submitted testimony to the Senate Veterans Affairs Committee on a bill that would permit the VA Secretary to revoke bonuses paid to employees involved in the waiting list manipulations (S. 627). On June 24 and September 16, 2015, I provided testimony to the same committee to clarify civil service due process requirements as they relate to proposed legislation expanding the VA SES appeals procedures to all VA General Schedule (GS) employees (S. 1082; S.1117; and H.R. 1994).

Despite our successful year, MSPB must be prepared to face external challenges such as the impact of recent and proposed changes in law and jurisdiction, changes in Federal workforce demographics, and possible reductions in Federal appropriations in FY 2018 and beyond (including the possible return of sequestration). These changes may affect our appeals workload beginning in FY 2016. These factors also emphasize the importance of our merit systems studies and Office of Personnel Management review functions to ensure that the workforce continues to be managed under the merit principles and free from PPPs.

Internally, approximately 20 percent of MSPB employees and about one-third of our AJs are eligible to retire in the next two years. We are thankful that Congress recognized our need for additional resources in FY 2014 and FY 2015, and stabilized those resources in FY 2016. These appropriations allowed us to make a necessary increase in the number of on-board employees at the end of FY 2015 by 12 percent over the number on board at the end of FY 2013. These additional resources were essential to our ability to adjudicate furlough and non-furlough cases in an efficient manner, and simultaneously perform our other statutory and support functions including adjudication of VA SES cases. We also bid a fond farewell to Vice Chairman Anne M. Wagner in February 2015. On July 8, 2015, the President nominated Mark P. Cohen as a Board Member to be designated Vice Chairman. The nomination was referred to the Senate Committee on July 8, 2015.

The overwhelming influx of furlough appeals required considerable changes and improvements to our processes and to our IT systems and infrastructure. It also emphasized the importance of our plan to modernize our processes by shifting from paper to electronic adjudication and records management. We also need a modern survey capability that ensures flexible survey design and secure, cloud-based Governmentwide administration to support our merit systems studies and customer service survey needs effectively and efficiently. Unfortunately, we experienced an IT outage in late June 2015 resulting in the loss of our virtual IT environment and employee working and archived documents. More information about the outage and its impact can be found later in this report and in the MSPB APR-APP for FY 2015-2017. MSPB will continue to consider internal IT operations and external IT issues in other agencies (such as recent data breaches) and recent changes in Governmentwide IT requirements, as applicable, to ensure we have a stable infrastructure to meet our needs and to implement our modernization efforts effectively.

As always, our success in FY 2015 required the combined efforts of every MSPB office and employee. Their expertise and dedication is without equal and Board Member Robbins and I are proud to work with them to achieve our mission.



Susan Tsui Grundmann,
Chairman

INTRODUCTION

This U.S. Merit Systems Protection Board (MSPB) Annual Report for FY 2015 includes summaries of the most significant Board decisions and relevant Court opinions, case processing statistics, summaries of MSPB's merit systems study reports and *Issues of Merit (IoM)* newsletter topics, and summaries of the significant actions of the Office of Personnel Management (OPM).² The report also contains summaries of the Board's financial status, outreach, and merit systems education activities, legislative and congressional relations activities, international activities, internal management issues, and the external factors that affect MSPB's work. When there have been significant activities or events since the end of FY 2015, the report includes updated information as a service to MSPB's stakeholders.

About MSPB

MSPB was created by the Civil Service Reform Act of 1978 (CSRA) to carry on the function of the Civil Service Commission to adjudicate employee appeals thus providing due process to employees and agencies. The CSRA authorized MSPB to develop its adjudicatory processes and procedures, issue subpoenas, call witnesses, and enforce compliance with final MSPB decisions. MSPB also was granted broad new authority to conduct independent, objective studies of the Federal merit systems and Federal human capital management issues. In addition, MSPB was given the authority and responsibility to review and act on OPM's regulations and review and report on OPM's significant actions.³ The CSRA also codified for the first time the values of the Federal merit systems as the merit system principles (MSPs) and delineated specific actions and practices as the prohibited personnel practices (PPPs) that were proscribed because they were contrary to merit system values.⁴ Since the CSRA, Congress has given MSPB jurisdiction to hear cases and complaints filed under a variety of other laws.⁵

MSPB's Mission and Vision

Mission:

To Protect the Merit System Principles and promote an effective Federal workforce free of Prohibited Personnel Practices.

Vision:

A highly qualified, diverse Federal workforce that is fairly and effectively managed, providing excellent service to the American people.

² The review of OPM significant actions conducted under 5 U.S.C. § 1206 is not, and should not be construed as, an advisory opinion (which is prohibited under 5 U.S.C. § 1204(h)).

³ Pursuant to 5 U.S.C. § 1204(f), MSPB may on its own motion, or at the request of other parties, review and declare invalid OPM regulations if such regulations, or the implementation of such regulations, would require an employee to commit a prohibited personnel practice. Pursuant to 5 U.S.C. § 1206, MSPB also is responsible for annually reviewing and reporting on OPM's significant actions.

⁴ Title 5 U.S.C. § 2301 and § 2302, respectively.

⁵ Including the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. § 4301 *et seq.*; the Veterans Employment Opportunity Act (VEOA), 5 U.S.C. § 3309 *et seq.*; the Whistleblower Protection Act (WPA), Pub. L. No. 101-12, 103 Stat. 16; The Whistleblower Protection Enhancement Act of 2012 (WPEA), Pub. L. No. 112-199; The Veterans Access, Choice and Accountability Act of 2014, Pub. L. No. 113-146; 5 U.S.C. § 4304; 5 U.S.C. § 7513; and those set out at 5 C.F.R. § 1201.3.

Board Members

The bipartisan Board consists of the Chairman, Vice Chairman, and Board Member, with no more than two of its three members from the same political party. Board members are appointed by the President, confirmed by the Senate, and serve overlapping, nonrenewable 7-year terms.



SUSAN TSUI GRUNDMANN

Chairman

November 2009 to Present

Susan Tsui Grundmann was nominated by President Barack Obama to serve as a Member and Chairman of the MSPB on July 31, 2009. She was confirmed by the U.S. Senate on November 5, 2009, and sworn in on November 12, 2009. Chairman Grundmann's term expires on March 1, 2016.

Previously, Ms. Grundmann served as General Counsel to the National Federation of Federal Employees (NFFE), which represents 100,000 Federal workers nationwide and is affiliated with the International Association of Machinist and Aerospace Workers. At NFFE, she successfully litigated cases in the U.S. District Court for the District of Columbia and the U.S. Court of Appeals for the District of Columbia. In 2004, Ms. Grundmann represented NFFE and other labor unions in the statutory "meet and confer" process with officials from the Department of Homeland Security (DHS) and OPM, which sought agreement on how to proceed with new DHS personnel regulations. She represented NFFE and the United Department of Defense Workers Coalition, consisting of 36 labor unions, and served on the Coalition's litigation team in a coordinated response to proposed personnel changes at the Department of Defense (DoD). In addition to DoD employees, Ms. Grundmann represented employees in the Forest Service, Department of Agriculture, Passport Service, Veterans Administration, General Services Administration, and some 25 additional Federal agencies. From 2003 to 2009, she was a regular instructor on Federal sector labor and employment law at the William W. Winpisinger Education Center in Placid Harbor, Maryland. Prior to joining NFFE, Ms. Grundmann served as General Counsel to the National Air Traffic Controllers Association. She began her legal career as a law clerk to the judges of the Nineteenth Judicial Circuit of Virginia, and later worked in both private practice and at the Sheet Metal Workers National Pension Fund. Chairman Grundmann earned her undergraduate degree at American University and her law degree at Georgetown University Law Center.



ANNE M. WAGNER

Vice Chairman

November 2009 to February 28, 2015

Anne M. Wagner was nominated by President Barack Obama to serve as a Member of the MSPB with the designation of Vice Chairman on July 31, 2009. Her nomination was confirmed by the U.S. Senate on November 5, 2009, and she was sworn in November 12, 2009. Although Ms. Wagner's term expired on March 1, 2014, she continued to serve in her position until March 1, 2015, in accordance with MSPB's governing statute, which specifies that a member may remain on the Board for a period of one additional year, or until a successor is confirmed, whichever occurs first.

Ms. Wagner came to the MSPB after serving as General Counsel of the Personnel Appeals Board of the U.S. Government Accountability Office (GAO). Prior to that, Ms. Wagner was appointed by the U.S. Comptroller General to serve a five-year statutory term as a Member of the GAO Personnel Appeals Board. Ms. Wagner began her career as a staff attorney in the Office of the General Counsel of the General Services Administration, where she primarily handled labor and employment issues. From there, she went on to become an Assistant General Counsel for the American Federation of Government Employees (AFGE), AFL-CIO, the largest Federal sector labor organization representing more than 600,000 Federal and District of Columbia government employees. In her nearly 20 years with AFGE, she led precedent-setting litigation and handled cases arising under the full array of laws governing Federal employment. Ms. Wagner graduated from the University of Notre Dame and received her J.D. from the George Washington University, National Law Center. She is admitted to practice law in the District of Columbia, Maryland, and Illinois as well as before various Federal Courts, including the U.S. Supreme Court.



MARK A. ROBBINS

Member

May 2012 to Present

Mark A. Robbins was nominated by President Barack Obama to serve as a Member of the MSPB on December 5, 2011. He was confirmed by the U.S. Senate on April 26, 2012. Mr. Robbins' term expires on March 1, 2018.

At the time of his nomination, Mr. Robbins was the General Counsel of the U.S. Election Assistance Commission. In that capacity, Mr. Robbins worked to certify elections systems and maintain information on the best practices of conducting elections. He previously served as a Senior Rule of Law Advisor for the State Department in Babil Province, Iraq. Mr. Robbins also served as

Executive Director of the White House Privacy and Civil Liberties Oversight Board between 2006 and 2008 and as General Counsel of the Office of Personnel Management from 2001 to 2006. He worked in private practice as a litigation attorney in Los Angeles, California, between 1988 and 2000, and in the White House Office of Presidential Personnel from 1984 to 1988. He began his career as a legislative assistant to two members of the U.S. House of Representatives, where, among other issues, he covered the Federal civil service and human resources management. Mr. Robbins earned both his undergraduate and law degrees from George Washington University. He is a member of the California and District of Columbia bars. In 2013, in recognition of his extensive professional involvement and continued leadership in public administration, Mr. Robbins was elected as a Fellow of the National Academy of Public Administration.

MSPB Offices and Their Functions

MSPB is headquartered in Washington, D.C. and has eight regional and field offices located throughout the United States. The agency is currently authorized to employ 226 Full-time Equivalents (FTEs) to conduct and support its statutory duties. Of note, MSPB appropriations for FY 2014 and 2015 supported an increase in the number of positions on-board at the end of FY 2015 to 220, a 12 percent increase over the 196 positions on-board at the end of FY 2013. Our appropriations for FY 2016 supported the retention of these resources.

The **Board Members** adjudicate the cases brought to the Board. The Chairman, by statute, is the chief executive and administrative officer. The Office Directors report to the Chairman through the **Executive Director**.

The **Office of the Administrative Law Judge (ALJ)** adjudicates and issues initial decisions in corrective and disciplinary action complaints (including Hatch Act complaints) brought by the Special Counsel, proposed agency actions against ALJs, MSPB employee appeals, and other cases assigned by MSPB. The functions of this office currently are performed under interagency agreements by ALJs at the Federal Trade Commission (FTC), the Coast Guard, and the Environmental Protection Agency (EPA).

The **Office of Appeals Counsel** conducts legal research and prepares proposed decisions for the Board to consider for cases in which a party files a Petition for Review (PFR) of an initial decision issued by an Administrative Judge (AJ) and in most other cases to be decided by the Board. The office prepares proposed decisions on interlocutory appeals of AJs' rulings, makes recommendations on reopening cases on the Board's own motion, and provides research, policy memoranda, and advice on legal issues to the Board.

The **Office of the Clerk of the Board** receives and processes cases filed at MSPB headquarters (HQ), rules on certain procedural matters, and issues Board decisions and orders. It serves as MSPB's public information center, coordinates media relations, operates MSPB's library and on-line information services, and administers the Freedom of Information Act (FOIA) and Privacy Act programs. It also certifies official records to the Courts and Federal administrative agencies, and manages MSPB's records systems, website content, and the Government in the Sunshine Act program.

The **Office of Equal Employment Opportunity** plans, implements, and evaluates MSPB's equal employment opportunity programs. It processes complaints of alleged discrimination brought by agency employees and provides advice and assistance on affirmative employment initiatives to MSPB's managers and supervisors.

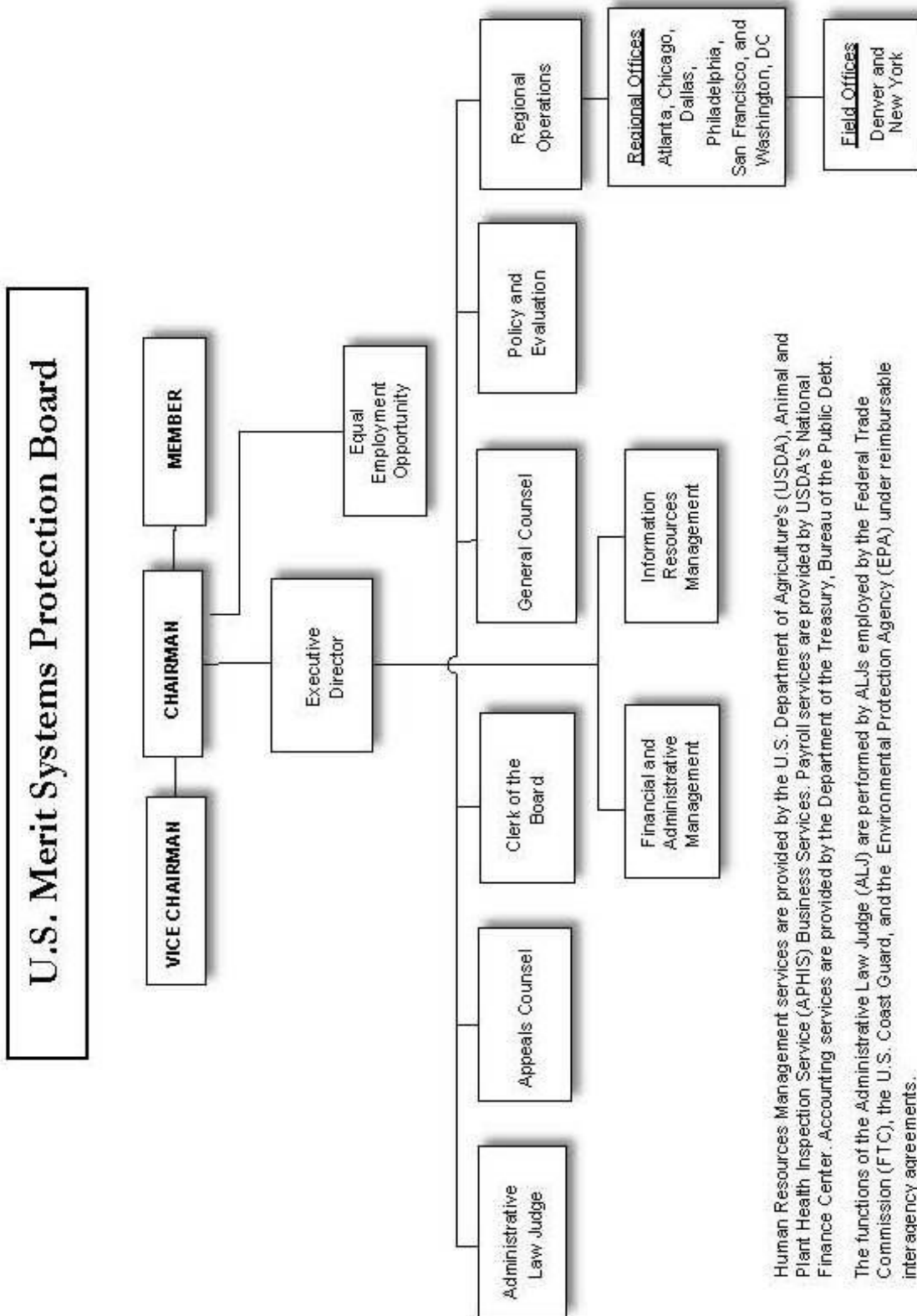
The **Office of Financial and Administrative Management** administers the budget, accounting, travel, time and attendance, human resources, procurement, property management, physical security, and general services functions of MSPB. It develops and coordinates internal management programs, including review of agency internal controls. It also administers the agency's cross-agency servicing agreements with the U.S. Department of Agriculture (USDA), National Finance Center for payroll services, U.S. Department of the Treasury, Bureau of the Public Debt for accounting services, and USDA's Animal and Plant Health Inspection Service for human resources services.

The **Office of the General Counsel**, as legal counsel to MSPB, advises the Board and MSPB offices on a wide range of legal matters arising from day-to-day operations. The office represents MSPB in litigation; coordinates the review of OPM rules and regulations; prepares proposed decisions for the Board to enforce a final MSPB decision or order, in response to requests to review OPM regulations, and for other assigned cases; conducts the agency's PFR settlement program; and coordinates the agency's legislative policy and congressional relations functions. The office also drafts regulations, conducts MSPB's ethics program, performs the Inspector General function, and plans and directs audits and investigations.

The **Office of Information Resources Management** develops, implements, and maintains MSPB's automated information systems to help the agency manage its caseload efficiently and carry out its administrative and research responsibilities.

The **Office of Policy and Evaluation** carries out MSPB's statutory responsibility to conduct special studies of the civil service and other Federal merit systems. Reports of these studies are sent to the President and the Congress and are distributed to a national audience. The office provides information and advice to Federal agencies on issues that have been the subject of MSPB studies. The office also carries out MSPB's statutory responsibility to review and report on the significant actions of OPM. The office conducts special projects and program evaluations for the agency and is responsible for coordinating MSPB's performance planning and reporting functions required by the Government Performance and Results Act Modernization Act of 2010 (GPRAMA).

The **Office of Regional Operations** oversees the agency's six regional and two field offices, which receive and process appeals and related cases. It also manages MSPB's Mediation Appeals Program (MAP). AJs in the regional and field offices are responsible for adjudicating assigned cases and for issuing fair, well-reasoned, and timely initial decisions.



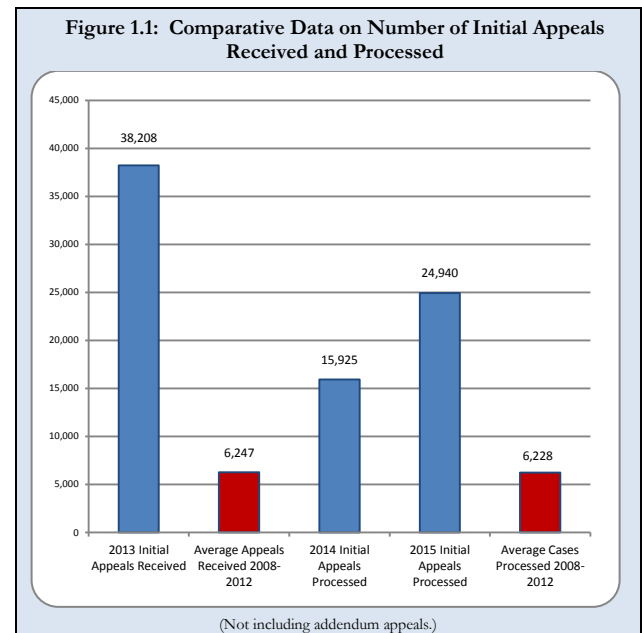
FISCAL YEAR 2015 IN REVIEW

Adjudication

In FY 2015, MSPB processed a new record number of 28,509 cases. This was a 63 percent increase over the record number of 17,466 cases processed in FY 2014.⁶

MSPB's AJs in the regional and field offices issued initial decisions in 25,367 cases, a new record, and a 55 percent increase over the number processed in 2014. To put this into context, Figure 1.1 shows the number of initial appeals received in FY 2013, and the number of initial appeals processed in FY 2014 and FY 2015 compared to the average number of appeals received and processed for 2008-2012.

The initial appeals processed in the regional and field offices included 19,949 individual furlough initial appeals. By the end of FY 2015, MSPB's regional and field offices processed 93 percent of the furlough initial appeals filed in FY 2013, and 70 percent of the non-furlough initial appeals workload. As of January 31, 2016, MSPB has issued decisions on 97 percent of furlough cases. In FY 2015, the regional and field offices also issued decisions in five cases filed by Senior Executive Service (SES) employees from the Department of Veterans Affairs under the Veterans' Access, Choice, and Accountability Act. One of these cases has been appealed to the Court of Appeals for the Federal Circuit. Thus far, in FY 2016, MSPB has three decisions on VA SES cases.



MSPB's Board Members at headquarters (HQ) processed a record number of 3,120 cases, almost three times the 1,101 cases processed in FY 2014. Of the 2,963 PFR cases processed at HQ, 2,137 were PFRs of individual furlough initial appeals. MSPB continued to provide alternative dispute resolution options to its customers including the Mediation Appeals Program (MAP). MSPB expanded the number of mediators in FY 2015, making this program more accessible to parties who desire to resolve their disputes through mediation. MSPB also completed the process of updating its regulations (see the next section). Information about whistleblower cases is available in MSPB's [APR-APP](#) for FY 2015-2017 in accord with the Whistleblower Protection Enhancement Act of 2012.

Statistical information on MSPB's case processing activity is contained later in this report in the section entitled "[Case Processing Statistics for FY 2015](#)," starting on page 15. Summaries of significant MSPB decisions, and opinions issued by the U.S. Court of Appeals and the U.S. Supreme Court are included in the section entitled "[Significant Board Decisions and Court Opinions Issued in FY 2015](#)," starting on page 35. This section also includes summaries of selected significant Board decisions and Court opinions issued in early FY 2016 for the convenience of MSPB's stakeholders.⁷

⁶ A large portion of the cases processed in both years were for furlough appeals filed in FY 2013.

⁷ Although we may include summaries of significant cases from early FY 2016 for the benefit of our stakeholders, case processing statistics include only cases processing for FY 2015.

MSPB Regulations

MSPB published its final [regulations](#) covering jurisdiction on January 28, 2015, concluding a process of overhauling MSPB's regulations that began in 2011. No further changes to MSPB regulations were proposed or implemented in FY 2015.

Merit Systems Studies

In FY 2015, MSPB approved and published three new merit system study reports on veterans' employment redress laws, the impact of recruitment strategy on fair and open competition, and due process in the Federal civil service. MSPB also issued three editions of its *Issues of Merit (IoM)* newsletter, four online articles and finalized its research agenda for FY 2015-2018. In addition, MSPB hired a contractor to program and implement the next Merit Principle Survey (MPS), scheduled for administration in mid-2016 to over 120,000 Federal employees. Summaries of FY 2015 MSPB merit systems study reports, *IoM* newsletter topics, and other merit systems studies activities are included in this report in the section entitled "[Summary of Merit Systems Studies Activity in FY 2015](#)" beginning on page 49. For the convenience of our stakeholders, that section also includes a summary of a merit systems study on SES education issued in early FY 2016.

The Significant Actions of the Office of Personnel Management

In accordance with 5 U.S.C. § 1206, MSPB is responsible for reviewing the significant actions of OPM to ensure that these actions conform with MSPs and do not result in PPPs. In FY 2015, MSPB reviewed OPM's new significant actions including: Senior Executive Service Reform and Modernization; Recruitment, Engagement, Diversity and Inclusion (REDI) Initiative; and Federal Supervisory and Managerial Framework and Guidance. MSPB coordinated and supported a White House SES Advisory Group and Leadership Development Program. MSPB updated the status of previous OPM significant actions and provided the review of OPM's work within the context of significant OPM issues including the data breaches and changes in OPM Leadership. More information about MSPB's review of OPM significant actions is included in that [section](#) of this report, beginning on page 53.

Outreach, Merit Systems Education, and References to MSPB's Work

MSPB's education and outreach efforts are designed to enhance the understanding of merit, ensure that MSPs are applied consistently throughout the Government, reduce the likelihood of PPPs, promote better management practices, and strengthen employee engagement. MSPB outreach also promotes better operation and understanding of the Federal merit system appeals process by sharing information about MSPB processes and its legal precedent. All of these efforts, in turn, help to improve employee and organizational performance, improve service to the American people, and provide value to the taxpayer.

In FY 2015, MSPB staff conducted 144 outreach events with customers, stakeholders, and sister agencies on its adjudication and merit systems studies work, and on the merit system, MSPs, and PPPs. MSPB staff made presentations to OPM, the Federal Executive Institute, and to management, union, and affinity groups. Several MSPB staff participated in live and taped interviews with Federal News Radio. MSPB staff members were invited to present at the Federal Dispute Resolution Conference, Federally Employed Women National Training Program, and the Federal Asian Pacific American Council National Leadership Training Program.

MSPB's adjudication and studies work, and other activities involving MSPB, were cited in at least 115 different print and online sources including wire services, professional and trade publications, newspapers, and other media. MSPB study reports were cited in a GAO report and in GAO testimony on Federal employee engagement, a GAO report on using the probationary period to manage poor performers, and an OPM white paper on how to engage Federal employees. The MSPB study on due process was also cited by Representative Mark Takano in testimony on S.1994.

International Activities

During FY 2015, MSPB hosted visitors from other countries to educate them on the organization of the Federal civil service, MSPB's structure and functions, and its role in fostering adherence to the MSPs and protecting employees and applicants from PPPs. MSPB staff members met with delegations from China and from the Republic of Turkey to provide an overview of the Federal civil service. MSPB staff also provided information to a delegation from Japan to discuss the employment and advancement of women in the Federal workforce.

Legislative and Congressional Relations Activity

Nomination of New Board Member. On July 8, 2015, President Obama nominated Mark P. Cohen, Principal Deputy Special Counsel, U. S. Office of Special Counsel, to be a member of the MSPB, with the intent to appoint him as Vice Chairman. Mr. Cohen would replace former MSPB Vice Chairman Anne M. Wagner, whose term expired on March 1, 2014. If confirmed, Mr. Cohen's term would expire on March 1, 2021.

Congressional Activity. Chairman Grundmann testified at a congressional hearing to examine employee misconduct and the tools available to Federal agencies to address misconduct conducted by the House Committee on Oversight and Government Reform on June 10, 2015. At the request of the Senate Committee on Veterans' Affairs, Chairman Grundmann submitted statements for the record for three congressional hearings. For a hearing held on May 13, 2015, she submitted a statement for the record, which presented her views on S. 627, a bill that would require the Secretary of Veterans Affairs to revoke bonuses paid to employees involved in electronic wait list manipulations. On June 24, 2015, her statement covered the impact of two bills (S. 1082), the Department of Veterans Affairs Accountability Act of 2015 and S. 1117, (Ensuring Veteran Safety through Accountability Act of 2015). On September 16, 2015, her statement included her views on S. 290, (increasing the Department of Veterans Affairs Accountability to Veterans Act of 2015) and S. 1856 (providing for the suspension and removal of employees of the Department of Veterans Affairs for performance or misconduct that is a threat to public health or safety).⁸

As stated earlier, during the floor debate in the House of Representatives on H.R. 1994, the VA Accountability Act of 2015, Rep. Mark Takano (D-CA) cited the MSPB report on due process in support of his position on the bill.⁹

Legislation that Impacts MSPB or the Civil Service. In August 2014, President Obama signed the Veterans Access, Choice, and Accountability Act into law. Section 707 of that Act, by adding a new section 713 to Title 38, United States Code, made significant changes to the MSPB adjudication process in appeals involving senior executive service employees from the Department of Veterans Affairs. Specifically, Section 707 requires MSPB AJs to *fully* adjudicate such appeals within 21

⁸ Chairman Grundmann's testimony is available on MSPB's website at www.mspb.gov.

⁹ <https://www.congress.gov/congressional-report/114th-congress/house-report/225/1>

calendar days from the date on which the appeal is filed. If the MSPB AJ does not issue a decision within 21 days, the Department of Veterans Affairs' personnel action becomes final. Also, unlike title 5 of the United States Code, the Act prohibits appeals of the MSPB AJ's decision to the full Board at MSPB headquarters in Washington, D.C. or to a federal court. Though the Act may have been widely perceived to make the disciplinary process more efficient from the Department of Veterans Affairs standpoint, it should be noted that it made very little change to substantive law. Indeed, in these appeals, the Department of Veterans Affairs is still required to prove its charges and appellants may still assert affirmative defenses. It should be noted that Section 707 is currently the subject of a constitutional challenge in the United States Court of Appeals for the Federal Circuit. *See Helman v. Dep't. of Veterans Affairs*, Case No. 15-3086 (Fed. Cir. 2015).

Recent legislation introduced in the House and Senate would expand a nearly identical MSPB adjudication process to Department of Veterans Affairs GS employees (S. 1082; S. 1117; and H.R. 1994). If either of the pieces of legislation were to become law, and the above-referenced MSPB adjudication process becomes standard for a significant number of federal employees, the effects on MSPB's operations would be dramatic, and MSPB would likely need to consider operational changes in order to meet the strict adjudication deadlines. As stated earlier, Chairman Susan Tsui Grundmann provided testimony to the Senate Committee on Veterans' Affairs on the potential effect this legislation will have not only on MSPB's operations, but also on due process implications with respect to covered federal employees. More information about the potential impact of this legislation on MSPB is contained in the section on changes in law and jurisdiction.^{10 11}

Internal Management Activities and Challenges

This information is provided as context for the other information contained in the Annual Report. More detailed information about MSPB's internal issues and challenges can be obtained in the MSPB APR-APP for FY 2015-2017. MSPB's main internal challenges include human capital issues and ensuring a stable, secure and viable IT infrastructure to support current mission and administrative functions and its modernization efforts, which include implementing MSPB's e-Adjudication initiative and obtaining a secure, cloud-based survey capability.

Human Capital Issues. Fortunately, MSPB's FY 2014 and FY 2015 appropriations enabled MSPB to increase the number of on-board employees to 220 at the end of FY 2015 (a 12% increase over the 196 positions filled at the end of FY 2013). We appreciate Congressional support of those requests, and our enacted appropriations for FY 2016, which will support retaining this level of staffing. Even so, over 20 percent of MSPB employees, including almost one-third of MSPB AJs, are eligible to retire in the next 2 years. Although MSPB has been able to fill these positions with well-qualified candidates, it takes 2-3 years for agency professionals, including AJs, to reach journey-level performance. MSPB has commenced a sustained strategic human capital planning process focused on its highest priority issues, including the high percentage of employees eligible to retire. MSPB currently has two Board Members – Chairman Susan Tsui Grundmann and Member Mark A. Robbins. In addition, as stated earlier, the President nominated Mark P. Cohen to fill the third Board Member position (vacated in February 2015 by Vice Chairman Anne M. Wagner).

¹⁰ In January 2016, H.R. 4358, the Senior Executive Service Accountability Act, was introduced and reported out of the House Committee on Oversight and Government Reform. This legislation would expand the VA SES provisions to all SES employees, Governmentwide.

¹¹ The National Defense Authorization Act (NDAA) for FY 2016 was passed early FY 2016. The NDAA changes MSPB jurisdiction for suitability cases and it changes Reduction in Force (RIF) guidelines, probationary periods, and authority to delay step increases for Department of Defense employees. <https://www.congress.gov/bill/114th-congress/senate-bill/1356/text>

MSPB results from the FY 2015 Federal Employee Viewpoint Survey (FEVS) were overwhelmingly positive. Specifically, the FEVS showed increases in the positive responses for almost every question on the survey, including employees' perceptions about having the necessary resources to do their jobs and improved perceptions about agency managers and leaders. In addition, MSPB ranked 8th and had the 2nd most improved employee engagement score among small agencies in 2015. In addition, MSPB was ranked 8th in 2015 and was the 5th most improved among small agencies in the BPTW Rankings. Continued stability in funding for FY 2017 and beyond will be necessary to sustain the improvement in employee satisfaction necessary to improve our processes and continue to perform our statutory functions effectively and efficiently.

IT Infrastructure Stability and Modernization. The overwhelming volume of furlough appeals reinforced the need for MSPB to shift from paper to electronic appeals processing (internally and externally) and records management to improve efficiency and customer service. The transition to e-Adjudication also supports Governmentwide initiatives on paperwork elimination, electronic records management, operational efficiency, effectiveness, and customer service. The e-Adjudication project will yield important potential improvements in efficiency, but will require a significant and sustained initial investment of resources. Although MSPB will be conducting the next MPS through contractor support, MSPB's current ability to improve the collection of important customer service information and the agency's long-term ability to conduct surveys to support merit systems studies requires obtaining an automated survey capability that provides flexibility in survey design and administration and works securely in a cloud-based environment.

Unfortunately, in late June 2015, MSPB experienced a significant disruption in its IT infrastructure resulting in the loss of MSPB's virtual environment as well as the loss of employee working and archived documents. The IT outage also had an adverse impact on the achievement of MSPB objectives related to implementation of surveys of current web-users, progress on e-Adjudication, and progress on obtaining a secure, cloud-based survey capability essential for our studies and customer survey functions. We know this event was not the result of a malicious internal or external action and did not result in release of sensitive information or in the loss of official adjudication documents. However, recovering from the event, recreating the virtual environment, and re-establishing the confidence MSPB employees have in the IT systems and processes will take time. In moving forward with its IT stability and modernization initiatives, MSPB is cognizant of recent data breaches in other agencies, and will consider the new Federal [cybersecurity requirements](#), as applicable.

Significant External Trends and Issues

This information also is provided as context for the information presented in the Annual Report. More details on the external trends and issues affecting MSPB's work can be obtained in the APR-APP for FY 2015-2017. The most significant external issues affecting MSPB's ability to carry out its mission to protect the Federal merit systems include recent and proposed changes in law and jurisdiction; changes in the demographics of the Federal workforce; and anticipated Governmentwide budget reductions in FY 2018 and beyond (including possible sequestration).

Changes in Law and Jurisdiction. The Veterans Access, Choice, and Accountability Act of 2014, referenced above, has adversely affected the processing of cases involving all other non-VA SES employees, including whistleblowers, veterans, and retirees who have the right to file appeals with MSPB. This is because MSPB has no choice but to prioritize these appeals, given the statutory language. Recent legislation introduced in the House and Senate expands the VA SES appeals procedures to the rest of the Department's General Schedule employees (S. 1082; S. 1117; and H.R. 1994). As it relates to MSPB, the new legislation would require that MSPB AJs issue a decision in an

expedited manner, without affording subsequent appeal to the Presidentially appointed and Senate confirmed MSPB Board Members, nor to the Court. The legislation also expands MSPB appeal rights to tens of thousands of medical personnel in the Department of Veterans Affairs who do not currently have the right to appeal to MSPB. It would be very difficult for MSPB to meet the requirements of this legislation if it is signed into law as it is currently written.

Demographics of the Federal Workforce. Among other changes in the demographics of the Federal workforce, the number of Federal employees eligible to retire, and the number of employees being added to the retirement rolls is increasing. Retirement appeals filed with MSPB rose to 1,274 in FY 2015, up from 937 and 968 in FY 2013 and FY 2014, respectively. MSPB likely is to continue to see increases in the number of retirement appeals filed with MSPB, thus increasing our adjudication workload.

Governmentwide Budget Reductions Beyond FY 2017. Furloughs conducted by agencies in response to budget sequestration in FY 2013 led to an historic increase in the number of appeals filed with MSPB. Although sequestration is not likely for FY 2016-2017, it is unclear if other Governmentwide budget reductions may occur in FY 2018 and beyond. In that event, budget reductions could mean an increase appeals involving furloughs, reductions in force (RIFs), or early retirements (through Voluntary Early Retirement Authority (VERA) and Voluntary Separation Incentive Payment (VSIP)). All of these changes also emphasize the importance of MSPB's merit systems studies and OPM review functions to help ensure the workforce is managed under the MSPs and free from PPPs.

CASE PROCESSING STATISTICS FOR FY 2015

Summary of Cases Decided by MSPB

Table 1: FY 2015 Summary of Cases Decided by MSPB¹²

Cases Decided in MSPB Regional and Field Offices	
Appeals ¹	24,940
Addendum Cases ²	392
Stay Requests ³	35
TOTAL Cases Decided in RO/FOs	25,367
Cases Decided by Administrative Law Judges (ALJs) - Original Jurisdiction⁴	22
Cases Decided by the Board	
Appellate Jurisdiction:	
Petitions for Review (PFRs) - Appeals	2,963
Petitions for Review (PFRs) - Addendum Cases	96
Reviews of Stay Request Rulings	0
Requests for Stay of Board Order	0
Reopenings ⁵	6
Court Remands	5
Compliance Referrals	27
EEOC Non-concurrence Cases	0
Arbitration Cases	11
Subtotal - Appellate Jurisdiction	3,108
Original Jurisdiction ⁶	10
Interlocutory Appeals	2
TOTAL Cases Decided by the Board	3,120
TOTAL Decisions (Board, ALJs, RO/FOs)	28,509

¹ This includes 19,949 initial decisions on initial furlough appeals filed as a result of furlough actions taken in FY 2013.

² Includes 106 requests for attorney fees, 108 Board remand cases, 161 compliance cases, 1 court remand case, 12 requests for compensatory damages (discrimination cases only), and 4 requests for consequential damages.

³ Includes 31 stay requests in whistleblower cases and 4 in non-whistleblower cases.

⁴ Initial Decisions by ALJ. Case type breakdown: 1 corrective action brought against agency, 2 Hatch Act cases, and 19 actions Against ALJs.

⁵ Includes 5 cases reopened by the Board on its own motion and 1 request for reconsideration by OPM.

⁶ Original Jurisdiction Case Type Breakdown: 6 OSC stay requests, 1 petition for rulemaking, 2 PFRs of actions against ALJs, and 1 request for regulation review.

¹² Case processing statistics are provided for FY 2015 only. Even though we may provide selected summaries of Board decisions released in FY 2016, the 2016 decisions are not included in the case processing statistics.

Cases Processed in the Regional and Field Offices

Due to the large number of initial appeals and PFRs processed in FY 2015, we are including charts displaying outcomes both with and without furlough cases. Pie charts without furlough appeal data are more comparable to similar charts from previous MSPB Annual Reports. Additional information may be footnoted in the charts.

Table 2: Disposition of Appeals Decided in the Regional and Field Offices, by Type of Case

	Decided	Dismissed ¹		Not Dismissed ¹		Settled ²		Adjudicated ²	
Type of Case	#	#	%	#	%	#	%	#	%
Adverse Action by Agency ³	21,565	5,733	26.58	15,832	73.42	778	4.91	15,054	95.09
Termination of Probationers	339	315	92.92	24	7.08	21	87.50	3	12.50
Reduction in Force	41	22	53.66	19	46.34	5	26.32	14	73.68
Performance	143	45	31.47	98	68.53	79	80.61	19	19.39
Acceptable Level of Competence (WIGI)	43	30	69.77	13	30.23	11	84.62	2	15.38
Suitability	65	32	49.23	33	50.77	30	90.91	3	9.09
CSRS Retirement: Legal	377	241	63.93	136	36.07	9	6.62	127	93.38
CSRS Retirement: Disability	5	4	80.00	1	20.00	0	0.00	1	100.00
CSRS Retirement: Overpayment	119	54	45.38	65	54.62	39	60.00	26	40.00
FERS Retirement: Legal	138	85	61.59	53	38.41	4	7.55	49	92.45
FERS Retirement: Disability	143	110	76.92	33	23.08	1	3.03	32	96.97
FERS Retirement: Overpayment	418	170	40.67	248	59.33	187	75.40	61	24.60
FERCCA	14	9	64.29	5	35.71	2	40.00	3	60.00
Individual Right of Action	400	271	67.75	129	32.25	80	62.02	49	37.98
USERRA	114	68	59.65	46	40.35	21	45.65	25	54.35
VEOA	228	97	42.54	131	57.46	5	3.82	126	96.18
Other ⁴	788	737	93.53	51	6.47	41	80.39	10	19.61
Total	24,940	8,023	32.17	16,917	67.83	1,313	7.76	15,604	92.24

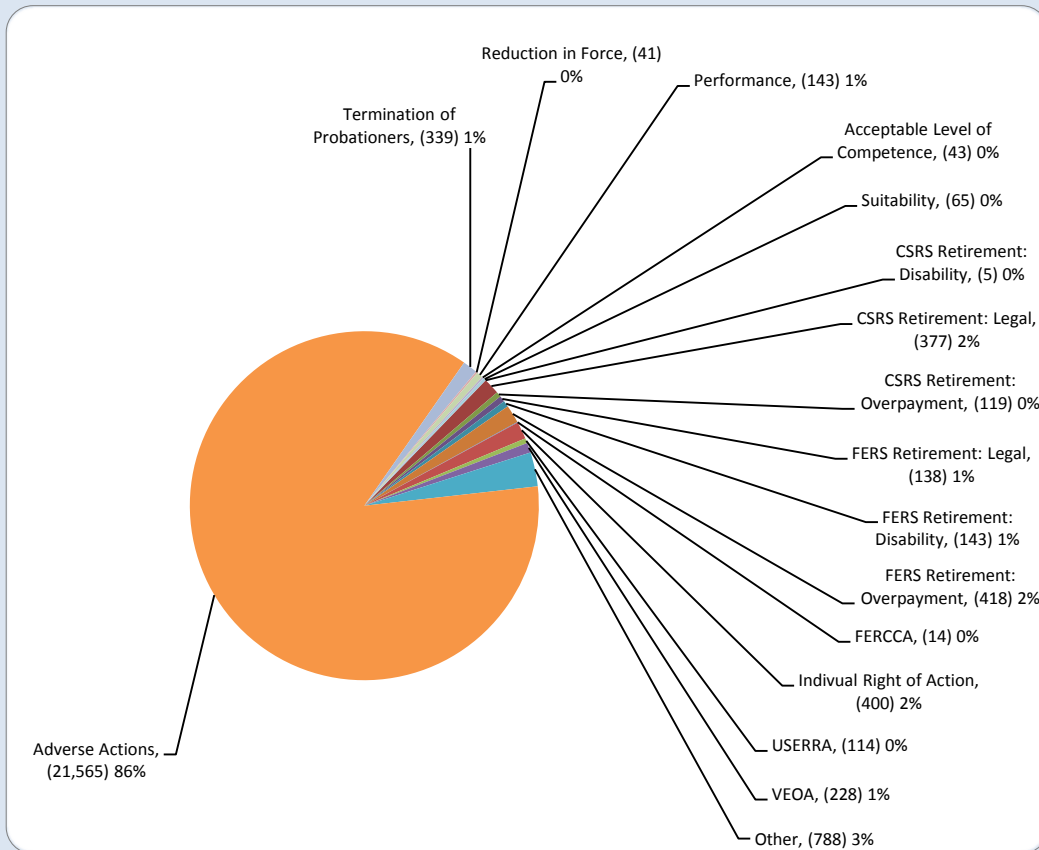
¹ Percent Dismissed and Not Dismissed are of the number Decided.

² Percent Settled and Adjudicated are of the number Not Dismissed

³ This includes 19,522 furlough appeals decided, 4,697 dismissed, 14,825 not dismissed, 32 settled, and 14,793 adjudicated on the merits.

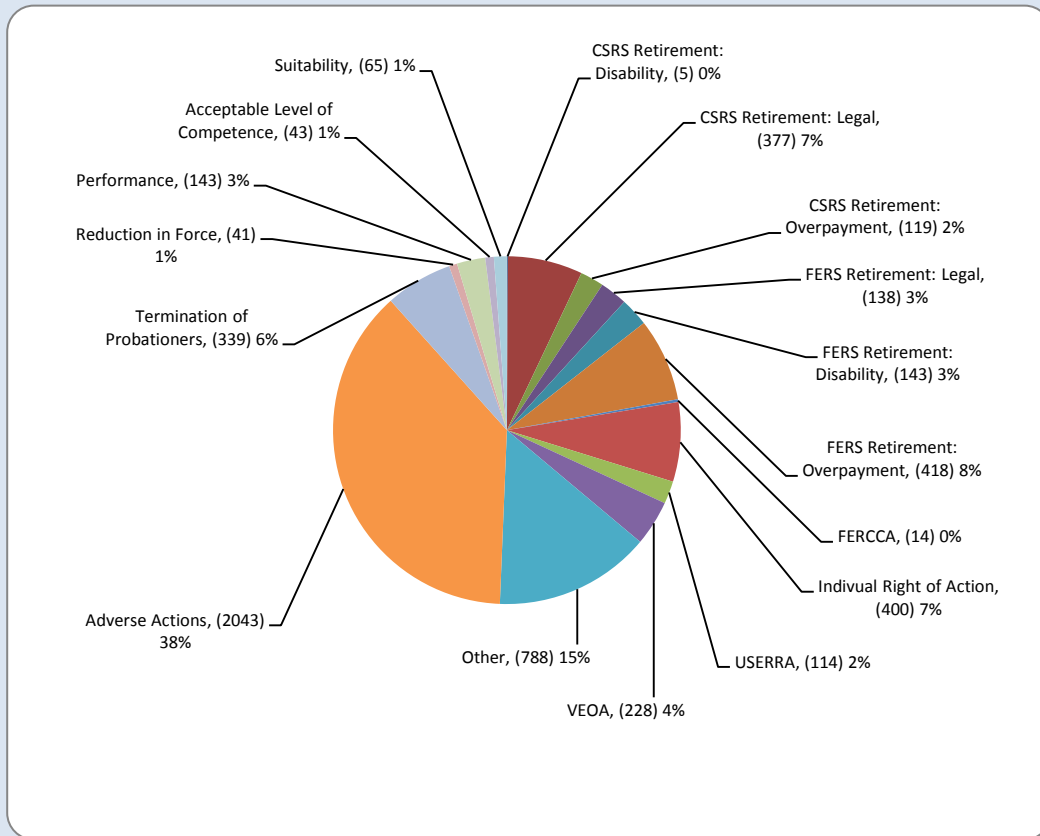
⁴ "Other" appeals include Restoration to Duty (102), Miscellaneous (627), and additional types such as Reemployment Priority, Employment Practices, and others.

**Figure 3.1: Type of Appeals Decided in the Regional and Field Offices
(Including furlough appeals)**



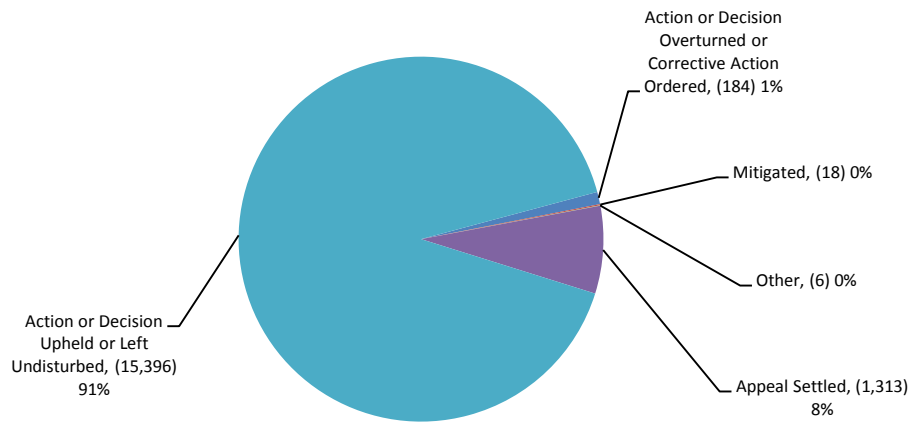
Total Number of Appeals: 24,940

**Figure 3.1a: Type of Appeals Decided in the Regional and Field Offices
(Not including furlough appeals)**



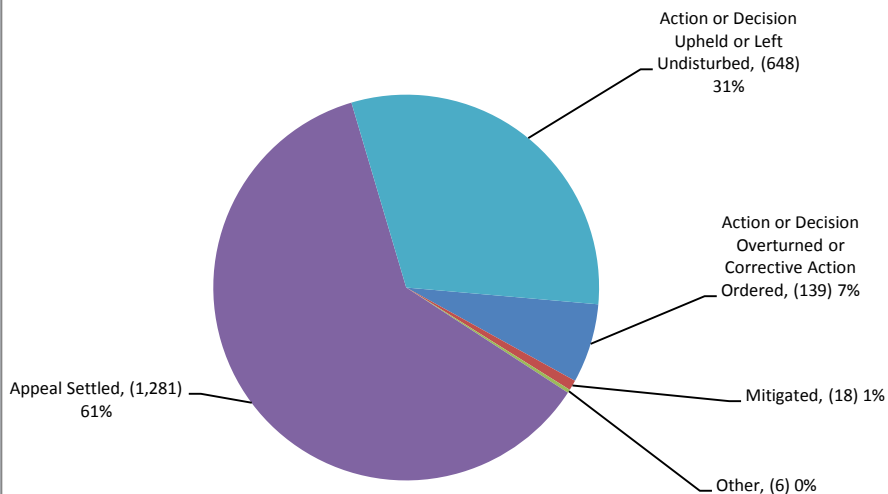
Total Number of Appeals: 5,418

Figure 3.2: Dispositions: Initial Appeals Not Dismissed by Regional/Field Offices (Including furlough appeals)



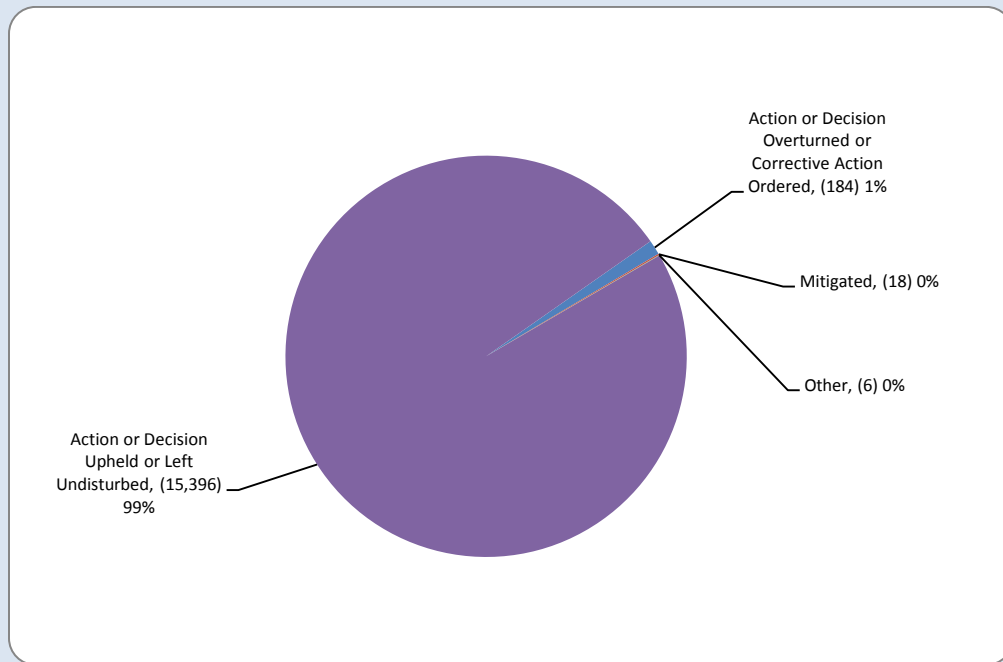
Total Number of Appeals that Were Not Dismissed: 16,917

Figure 3.2a: Dispositions: Initial Appeals Not Dismissed by Regional/Field Offices (Not including furlough appeals)



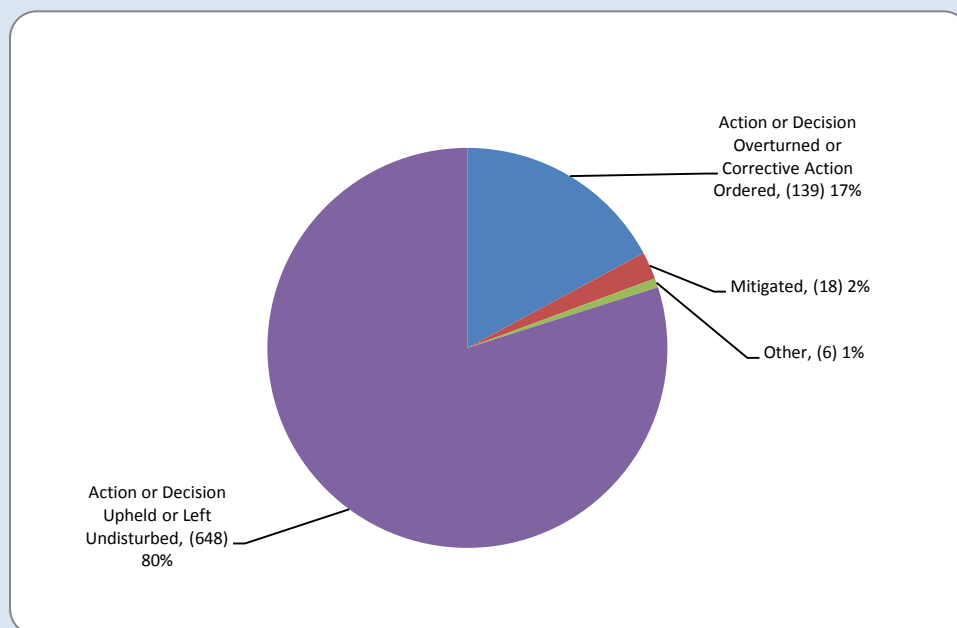
Total Number of Appeals that Were Not Dismissed: 2,092

Figure 3.3: Dispositions: Initial Appeals Not Dismissed or Settled by Regional/Field Office (Including furlough appeals)



Based on 15,604 Appeals Adjudicated on the Merits

Figure 3.3a: Dispositions: Initial Appeals Not Dismissed or Settled by Regional/Field Office (Not including furlough appeals)



Based on 811 Appeals Adjudicated on the Merits

Table 3: Disposition of Appeals by Agency *

	Decided	Dismissed ¹		Not Dismissed ¹		Settled ²		Adjudicated ²	
Agency	#	#	%	#	%	#	%	#	%
Department of the Navy	8,210	2,780	33.9	5,430	66.1	91	1.7	5,339	98.3
Department of the Army	4,421	1,170	26.5	3,251	73.5	138	4.2	3,113	95.8
Department of the Air Force	4,371	529	12.1	3,842	87.9	59	1.5	3,783	98.5
Department of Defense	3,642	948	26.0	2,694	74.0	54	2.0	2,640	98.0
Office of Personnel Management ³	1,240	677	54.6	563	45.4	267	47.4	296	52.6
Department of Veterans Affairs	755	487	64.5	268	35.5	192	71.6	76	28.4
United States Postal Service	584	411	70.4	173	29.6	148	85.5	25	14.5
Department of Homeland Security	356	222	62.4	134	37.6	91	67.9	43	32.1
Department of the Treasury	238	111	46.6	127	53.4	33	26.0	94	74.0
Department of Health and Human Services	192	75	39.1	117	60.9	36	30.8	81	69.2
Department of Justice	125	96	76.8	29	23.2	17	58.6	12	41.4
Department of Transportation	115	88	76.5	27	23.5	20	74.1	7	25.9
Department of the Interior	113	70	61.9	43	38.1	29	67.4	14	32.6
Department of Agriculture	107	55	51.4	52	48.6	39	75.0	13	25.0
Social Security Administration	85	61	71.8	24	28.2	17	70.8	7	29.2
Department of Labor	53	38	71.7	15	28.3	10	66.7	5	33.3
Department of Commerce	52	32	61.5	20	38.5	14	70.0	6	30.0
Department of State	40	27	67.5	13	32.5	8	61.5	5	38.5
Department of Energy	34	22	64.7	12	35.3	8	66.7	4	33.3
Department of Housing and Urban Development	21	13	61.9	8	38.1	5	62.5	3	37.5
Environmental Protection Agency	18	13	72.2	5	27.8	3	60.0	2	40.0
Federal Deposit Insurance Corporation	18	9	50.0	9	50.0	4	44.4	5	55.6
General Services Administration	17	10	58.8	7	41.2	3	42.9	4	57.1
National Aeronautics and Space Administration	14	7	50.0	7	50.0	5	71.4	2	28.6
Equal Employment Opportunity Commission	12	9	75.0	3	25.0	3	100.0	0	0.0
Small Business Administration	11	8	72.7	3	27.3	1	33.3	2	66.7
Smithsonian Institution	10	8	80.0	2	20.0	1	50.0	1	50.0
Tennessee Valley Authority	10	4	40.0	6	60.0	1	16.7	5	83.3
Agency for International Development	9	4	44.4	5	55.6	0	0.0	5	100.0
Securities and Exchange Commission	7	4	57.1	3	42.9	2	66.7	1	33.3

*Data contain both furlough and nonfurlough appeals.

¹ Percent Dismissed and Not Dismissed are of the number Decided.

² Percent Settled and Adjudicated are of the number Not Dismissed.

³ Most appeals in which OPM is the agency are retirement cases involving decisions made by OPM as the administrator of the Civil Service Retirement System and the Federal Employees Retirement System.

Table 3: Disposition of Appeals by Agency (Cont.)

	Decided	Dismissed ¹		Not Dismissed ¹		Settled ²		Adjudicated ²	
Agency	#	#	%	#	%	#	%	#	%
Department of Education	5	2	40.0	3	60.0	2	66.7	1	33.3
Government Printing Office	5	0	0.0	5	100.0	2	40.0	3	60.0
Export-import Bank of the United States	3	2	66.7	1	33.3	1	100.0	0	0.0
Other	3	3	100.0	0	0.0	0	0.0	0	0.0
Armed Forces Retirement Home	2	1	50.0	1	50.0	0	0.0	1	100.0
Central Intelligence Agency	2	2	100.0	0	0.0	0	0.0	0	0.0
Commodity Futures Trading Commission	2	2	100.0	0	0.0	0	0.0	0	0.0
Consumer Product Safety Commission	2	1	50.0	1	50.0	0	0.0	1	100.0
Federal Communications Commission	2	2	100.0	0	0.0	0	0.0	0	0.0
Federal Housing Finance Agency	2	1	50.0	1	50.0	1	100.0	0	0.0
Judicial Branch	2	2	100.0	0	0.0	0	0.0	0	0.0
Nuclear Regulatory Commission	2	1	50.0	1	50.0	1	100.0	0	0.0
Peace Corps	2	1	50.0	1	50.0	0	0.0	1	100.0
Pension Benefit Guaranty Corporation	2	1	50.0	1	50.0	1	100.0	0	0.0
Railroad Retirement Board	2	1	50.0	1	50.0	1	100.0	0	0.0
U.S. Tax Court	2	2	100.0	0	0.0	0	0.0	0	0.0
American Battle Monuments Commission	1	1	100.0	0	0.0	0	0.0	0	0.0
Broadcasting Board of Governors	1	0	0.0	1	100.0	1	100.0	0	0.0
Commission for the Preservation of America's Heritage Abroad	1	0	0.0	1	100.0	1	100.0	0	0.0
Committee for Purchase from People Who Are Blind or Severely Disabled	1	0	0.0	1	100.0	0	0.0	1	100.0
Election Assistance Commission	1	1	100.0	0	0.0	0	0.0	0	0.0
Federal Labor Relations Authority	1	1	100.0	0	0.0	0	0.0	0	0.0
Federal Maritime Commission	1	0	0.0	1	100.0	0	0.0	1	100.0
Federal Reserve System	1	1	100.0	0	0.0	0	0.0	0	0.0

¹ Percent Dismissed and Not Dismissed are of the number Decided.

² Percent Settled and Adjudicated are of the number Not Dismissed.

Table 3: Disposition of Appeals by Agency (Cont.)

	Decided	Dismissed ¹		Not Dismissed ¹		Settled ²		Adjudicated ²	
Agency	#	#	%	#	%	#	%	#	%
Federal Retirement Thrift Investment Board	1	1	100.0	0	0.0	0	0.0	0	0.0
Government of the District of Columbia	1	1	100.0	0	0.0	0	0.0	0	0.0
Inter-American Foundation	1	1	100.0	0	0.0	0	0.0	0	0.0
International Boundary and Water Commission: U.S. and Mexico	1	0	0.0	1	100.0	1	100.0	0	0.0
Merit Systems Protection Board	1	1	100.0	0	0.0	0	0.0	0	0.0
Millennium Challenge Corporation	1	1	100.0	0	0.0	0	0.0	0	0.0
National Archives and Records Administration	1	0	0.0	1	100.0	1	100.0	0	0.0
National Credit Union Administration	1	1	100.0	0	0.0	0	0.0	0	0.0
National Labor Relations Board	1	0	0.0	1	100.0	0	0.0	1	100.0
National Science Foundation	1	0	0.0	1	100.0	1	100.0	0	0.0
Office of Special Counsel	1	0	0.0	1	100.0	0	0.0	1	100.0
Selective Service System	1	1	100.0	0	0.0	0	0.0	0	0.0
TOTAL	24,940	8,023	32.2	16,917	67.8	1,313	7.8	15,604	92.2

¹ Percent Dismissed and Not Dismissed are of the number Decided.

² Percent Settled and Adjudicated are of the number Not Dismissed.

**Table 4: Disposition of Initial Appeals Adjudicated on the Merits
by Agency***

	Adjudicated ¹	Affirmed		Reversed		Mitigated Modified		Other	
Agency	#	#	%	#	%	#	%	#	%
Department of the Navy	5,339	5,325	99.74	12	0.2	2	0.0	0	0.0
Department of the Air Force	3,783	3,777	99.84	5	0.1	1	0.0	0	0.0
Department of the Army	3,113	3,057	98.20	54	1.7	2	0.1	0	0.0
Department of Defense	2,640	2,630	99.62	9	0.3	1	0.0	0	0.0
Office of Personnel Management ²	296	234	79.05	53	17.9	3	1.0	6	2.0
Department of the Treasury	94	94	100	0	0.0	0	0.0	0	0.0
Department of Health and Human Services	81	75	92.59	6	7.4	0	0.0	0	0.0
Department of Veterans Affairs	76	56	73.68	17	22.4	3	3.9	0	0.0
Department of Homeland Security	43	34	79.07	5	11.6	4	9.3	0	0.0
United States Postal Service	25	19	76.00	6	24.0	0	0.0	0	0.0
Department of the Interior	14	12	85.71	2	14.3	0	0.0	0	0.0
Department of Agriculture	13	11	84.62	1	7.7	1	7.7	0	0.0
Department of Justice	12	10	83.33	1	8.3	1	8.3	0	0.0
Department of Transportation	7	5	71.43	2	28.6	0	0.0	0	0.0
Social Security Administration	7	5	71.43	2	28.6	0	0.0	0	0.0
Department of Commerce	6	4	66.67	2	33.3	0	0.0	0	0.0
Agency for International Development	5	5	100	0	0.0	0	0.0	0	0.0
Department of Labor	5	4	80.00	1	20.0	0	0.0	0	0.0
Department of State	5	5	100	0	0.0	0	0.0	0	0.0
Federal Deposit Insurance Corporation	5	4	80.00	1	20.0	0	0.0	0	0.0
Tennessee Valley Authority	5	3	60.00	2	40.0	0	0.0	0	0.0
Department of Energy	4	4	100	0	0.0	0	0.0	0	0.0
General Services Administration	4	3	75.00	1	25.0	0	0.0	0	0.0
Department of Housing and Urban Development	3	3	100	0	0.0	0	0.0	0	0.0
Government Printing Office	3	3	100	0	0.0	0	0.0	0	0.0
Environmental Protection Agency	2	2	100	0	0.0	0	0.0	0	0.0
National Aeronautics and Space Administration	2	2	100	0	0.0	0	0.0	0	0.0
Small Business Administration	2	1	50.00	1	50.0	0	0.0	0	0.0

* This includes both furlough and nonfurlough appeals.

¹ Adjudicated on the merits, i.e., not dismissed or settled.

² Most appeals in which OPM is the agency are retirement cases involving decisions made by OPM as the administrator of the Civil Service Retirement System and the Federal Employees Retirement System.

Percentages may not total 100 because of rounding.

**Table 4: Disposition of Initial Appeals Adjudicated on the Merits
by Agency (Cont.)**

	Adjudicated ¹	Affirmed		Reversed		Mitigated Modified		Other	
Agency	#	#	%	#	%	#	%	#	%
Armed Forces Retirement Home	1	1	100	0	0.0	0	0.0	0	0.0
Committee for Purchase from People Who Are Blind or Severely Disabled	1	1	100	0	0.0	0	0.0	0	0.0
Consumer Product Safety Commission	1	1	100	0	0.0	0	0.0	0	0.0
Department of Education	1	0	0.00	1	100.0	0	0.0	0	0.0
Federal Maritime Commission	1	1	100	0	0.0	0	0.0	0	0.0
National Labor Relations Board	1	1	100	0	0.0	0	0.0	0	0.0
Office of Special Counsel	1	1	100	0	0.0	0	0.0	0	0.0
Peace Corps	1	1	100	0	0.0	0	0.0	0	0.0
Securities and Exchange Commission	1	1	100	0	0.0	0	0.0	0	0.0
Smithsonian Institution	1	1	100	0	0.0	0	0.0	0	0.0
TOTAL	15,604	15,396	98.7	184	1.2	18	0.1	6	0.0

¹ Adjudicated on the merits, i.e., not dismissed or settled.

Cases Processed at Headquarters

For case outcomes, we have provided data both with and without furlough cases. The data without furlough cases is most comparable to case processing data in previous Annual reports.

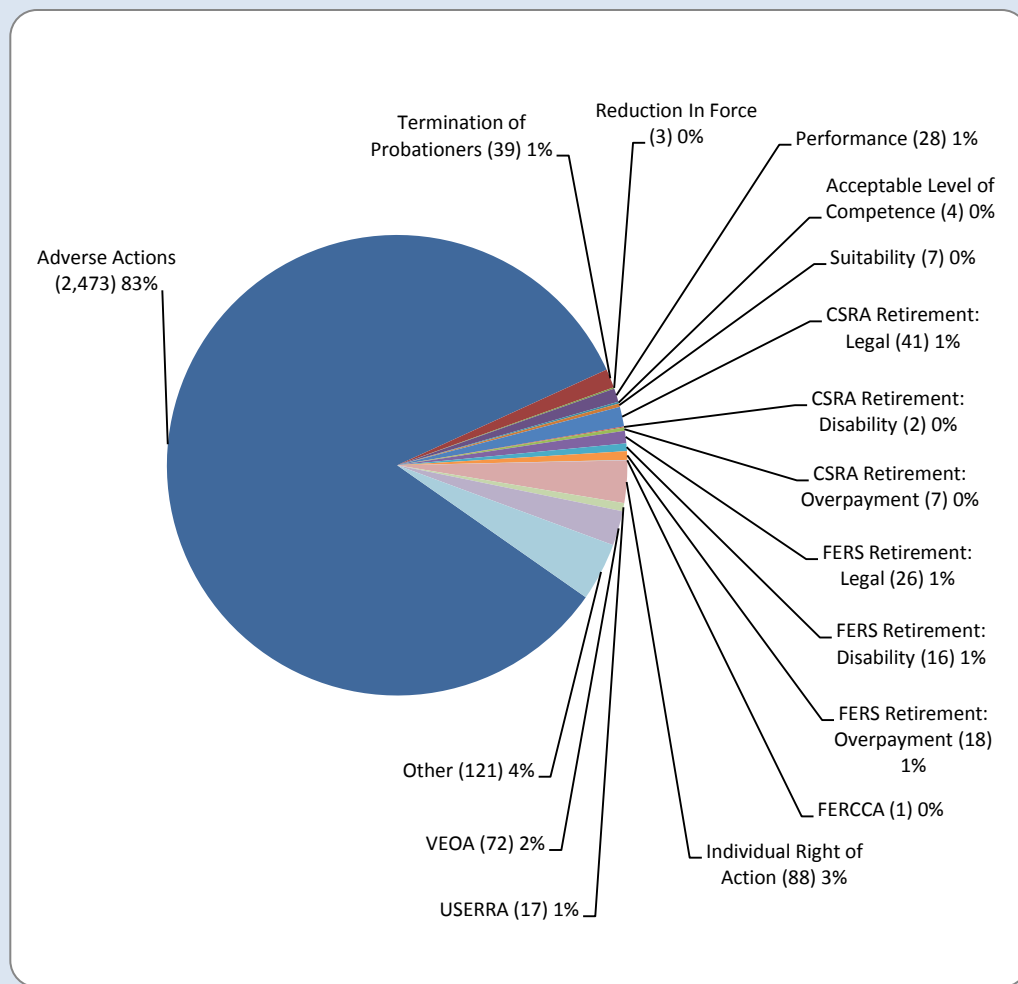
**Table 5: Disposition of Petitions for Review of Initial Decisions
by Type of Case**

	Decided		Dismissed		Settled		Denied		Denied; Further Analysis ¹		Granted	
Type of Case	#	%	#	%	#	%	#	%	#	%	#	%
Adverse Action by the Agency ²	2,473	46	1.86	6	0.24	2,350	95.03	12	0.49	59	2.39	
Termination of Probationers	39	1	2.56	1	2.56	32	82.05	1	2.56	4	10.26	
Reduction in Force	3	0	0.00	0	0.00	2	66.67	0	0.00	1	33.33	
Performance	28	2	7.14	1	3.57	19	67.86	1	3.57	5	17.86	
Acceptable Level of Competence (WIGI)	4	0	0.00	1	25.00	1	25.00	0	0.00	2	50.00	
Suitability	7	0	0.00	0	0.00	4	57.14	0	0.00	3	42.86	
CSRS Retirement: Legal	41	3	7.32	2	4.88	32	78.05	2	4.88	2	4.88	
CSRS Retirement: Disability	2	0	0.00	0	0.00	2	100.00	0	0.00	0	0.00	
CSRS Retirement: Overpayment	7	0	0.00	1	14.29	5	71.43	0	0.00	1	14.29	
FERS Retirement: Legal	26	1	3.85	1	3.85	20	76.92	1	3.85	3	11.54	
FERS Retirement: Disability	16	2	12.50	0	0.00	11	68.75	1	6.25	2	12.50	
FERS Retirement: Overpayment	18	1	5.56	0	0.00	12	66.67	0	0.00	5	27.78	
FERCCA	1	0	0.00	0	0.00	0	0.00	0	0.00	1	100.00	
Individual Right of Action	88	7	7.95	1	1.14	55	62.50	6	6.82	19	21.59	
USERRA	17	0	0.00	0	0.00	11	64.71	3	17.65	3	17.65	
VEOA	72	2	2.78	0	0.00	64	88.89	3	4.17	3	4.17	
Other	121	5	4.13	1	0.83	101	83.47	1	0.83	13	10.74	
Total	2,963	70	2.36	15	0.51	2,721	91.83	31	1.05	126	4.25	

¹ Similar to the FY 2014 Annual Report, “Denied; Further Analysis” includes cases denied on the basis of the issues raised in the PFR, but in which the Board has considered an issue *sua sponte*, i.e., of the Board’s own accord (5 C.F.R. § 1201.117(a)). This definition applies also to Table 6, and Figures 3.5, 3.5a, 3.7 and 3.7a. Historically, when the Board denied a party’s PFR, but upon review of a case, chose to analyze additional issues, this was described as “reopening the appeal on its own motion under 5 C.F.R. § 1201.118,” and the description used in the Annual Report was “Denied But Reopened.” In 2012, the Board amended its regulation at 5 C.F.R. § 1201.118 to state that “reopening” only applies to instances in which the Board has already issued a final order or the initial decision has become the Board’s final decision by operation of law. The Board refrains from using the term “reopening” in adjudicating a PFR unless it is taking action to reopen a closed matter. Accordingly, the Board will continue to report dispositions of cases that are denied, but in which the Board considers other issues of its own accord as “Denied; Further Analysis.”

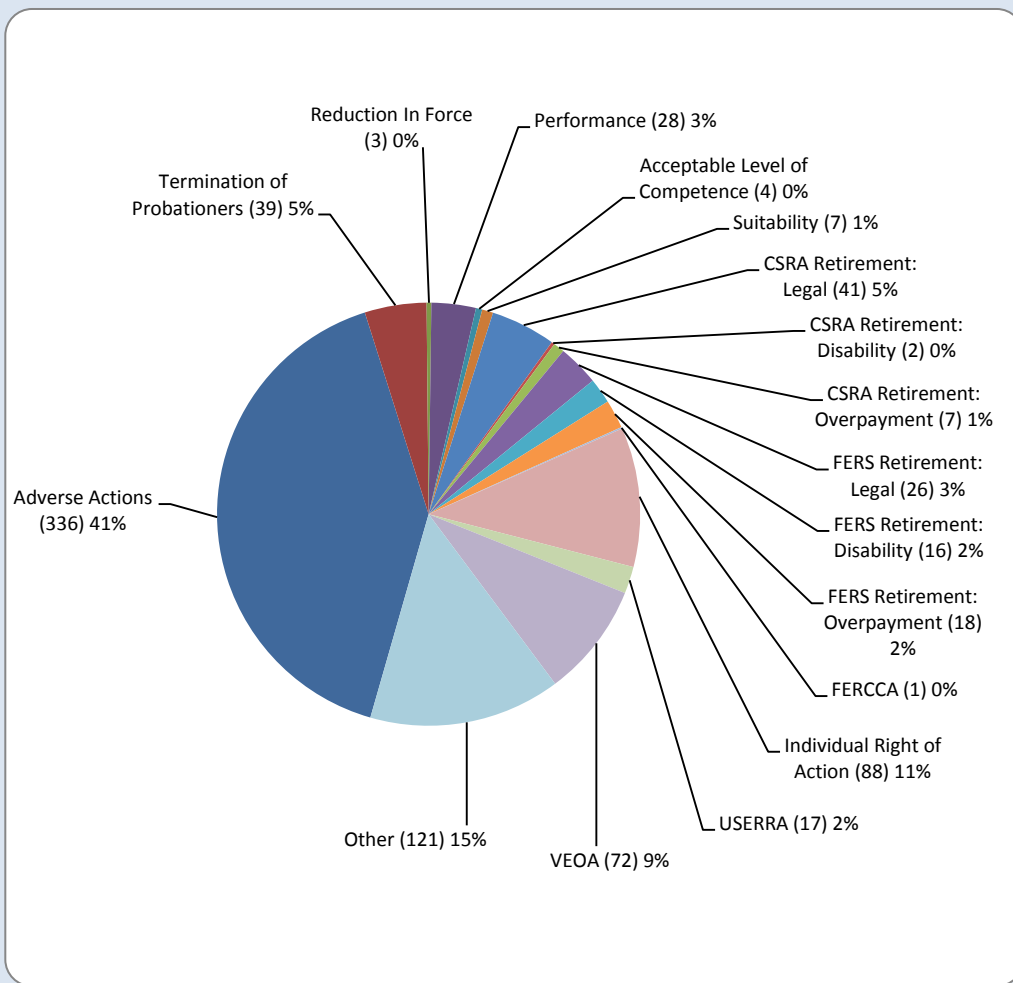
² This includes 2,137 furlough appeals decided, 25 furlough appeals dismissed, 2,101 furlough appeals denied, 5 furlough appeals denied; further analysis, and 6 furlough appeals granted.

Figure 3.4: Types of Petitions for Review (Including furlough appeals)



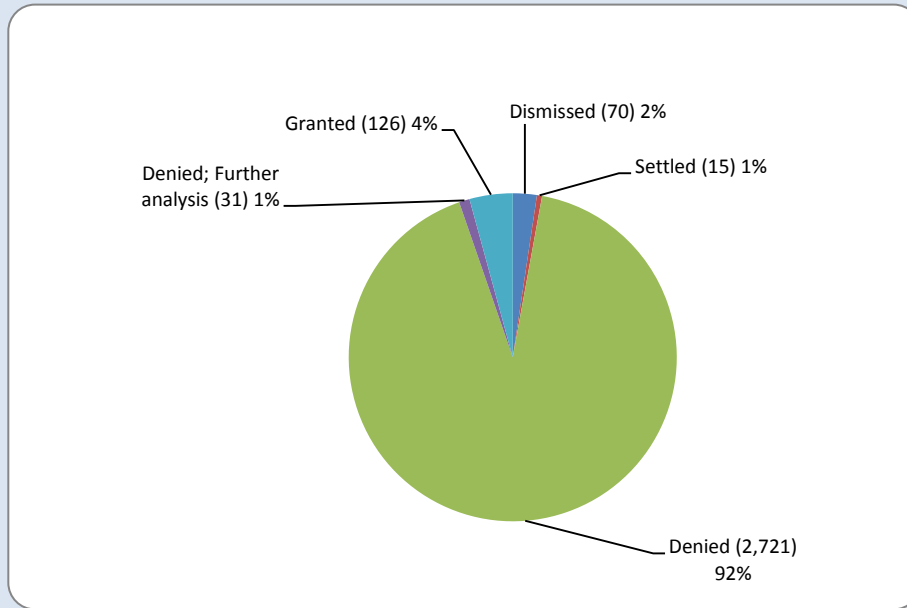
Total Number of PFRs: 2,963

Figure 3.4a: Types of Petitions for Review (Not including furlough appeals)



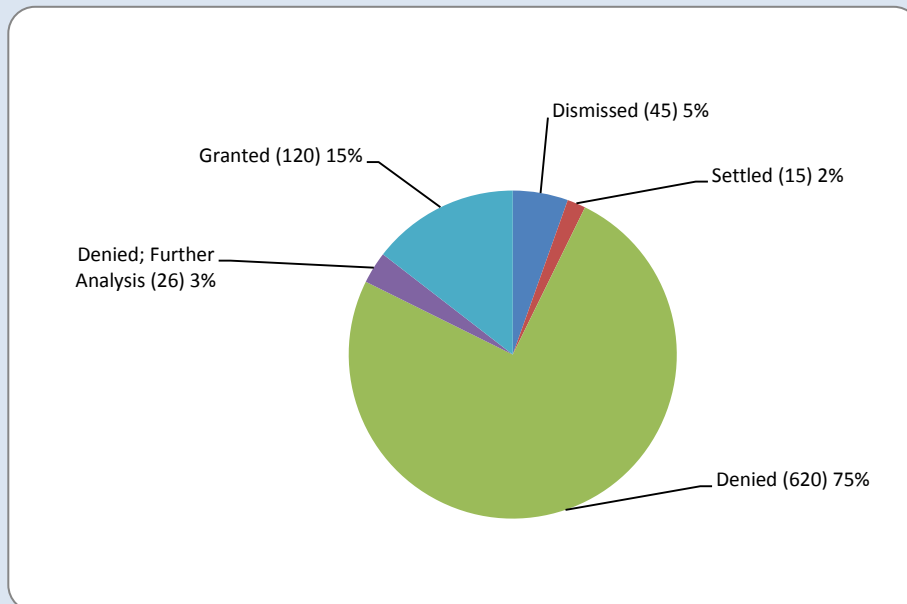
Total Number of PFRs: 826

**Figure 3.5: Disposition of Petitions for Review of Initial Decisions
(Including furlough appeals)**



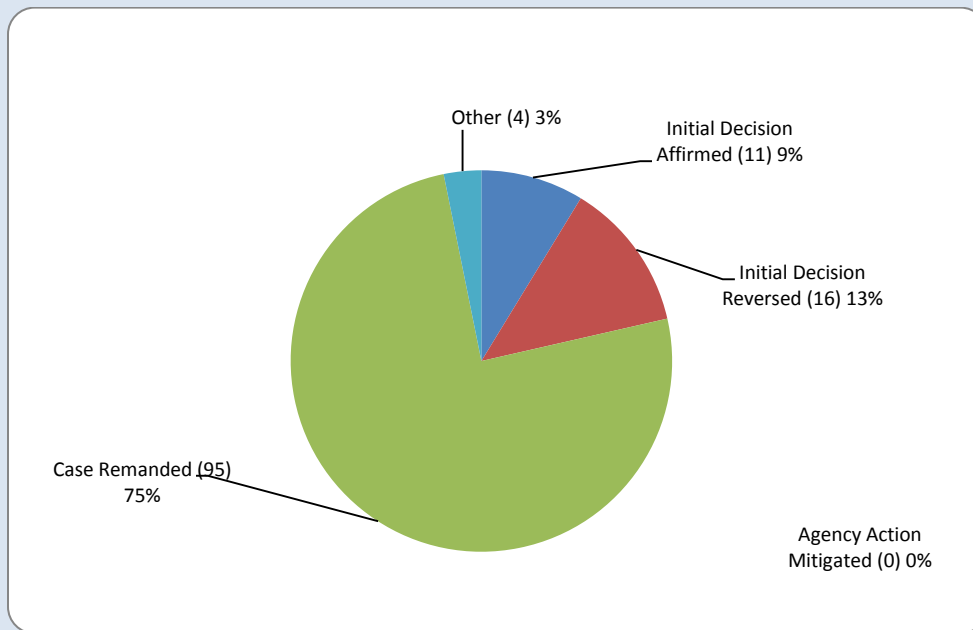
Based on 2,963 Total PFRs

**Figure 3.5a: Disposition of Petitions for Review of Initial Decisions
(Not including furlough appeals)**



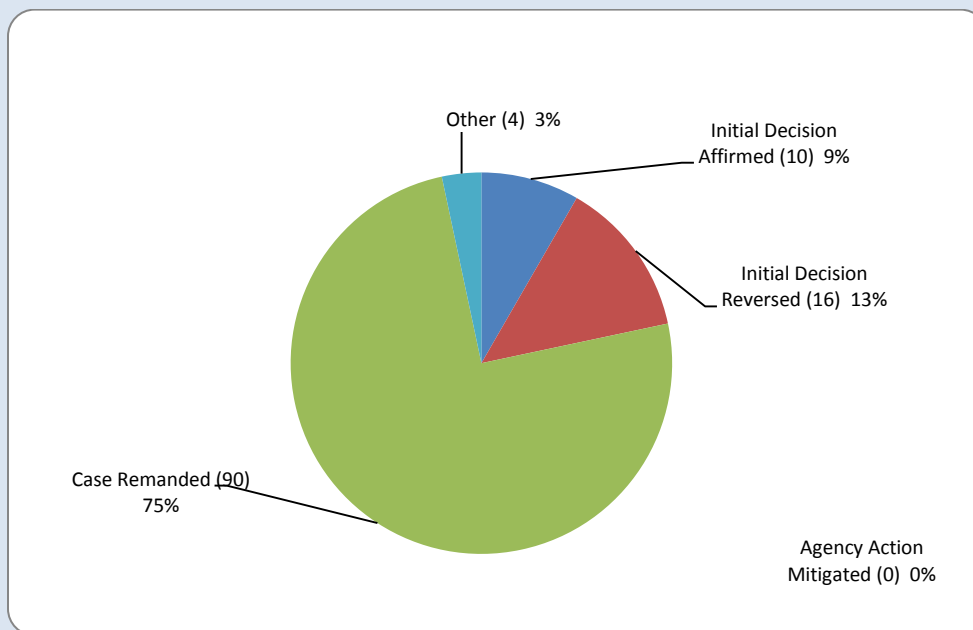
Based on 826 Total PFRs

**Figure 3.6: Disposition of Petitions for Review Granted
(Including furlough appeals)**



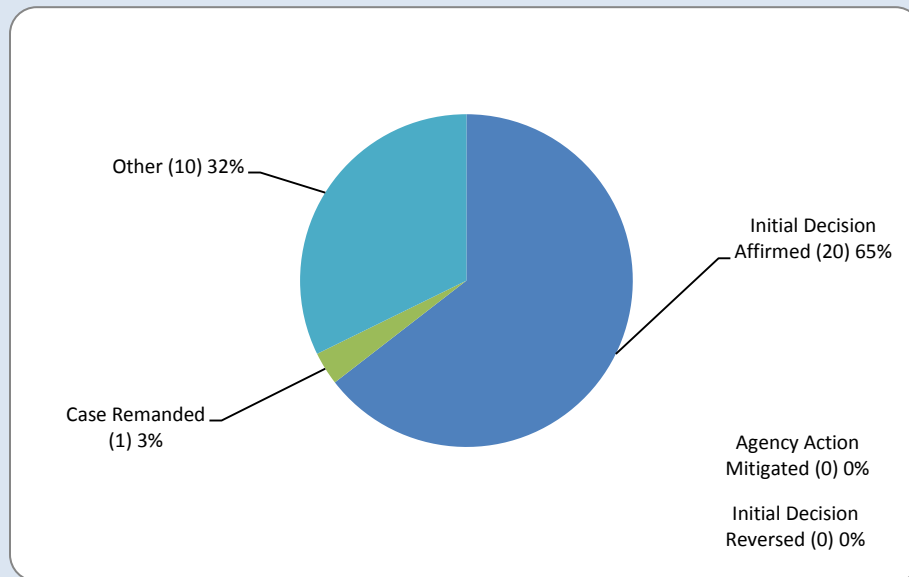
Based on 126 PFRs Granted

**Figure 3.6a: Disposition of Petitions for Review Granted
(Not including furlough appeals)**



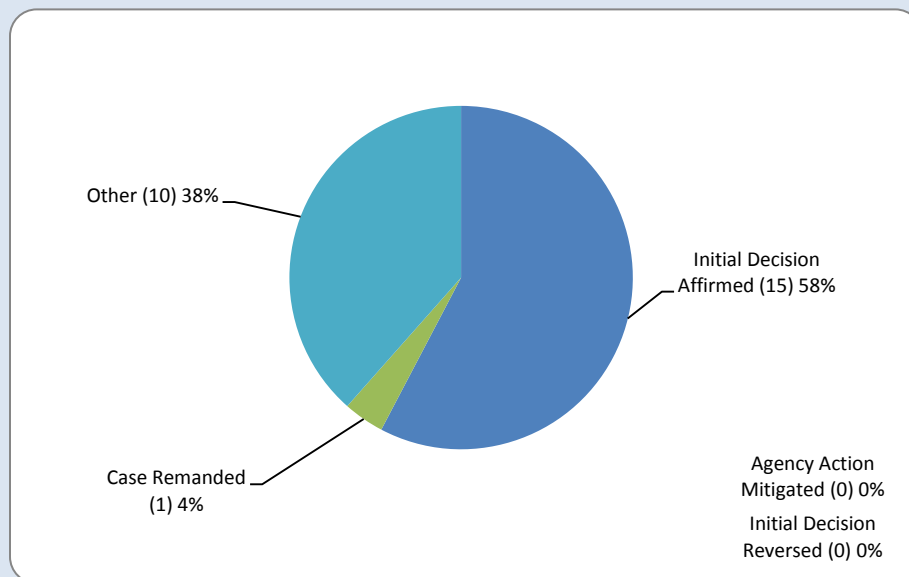
Based on 120 PFRs Granted

**Figure 3.7: Disposition of Petitions for Review Denied; Further Analysis
(Including furlough appeals)**



Based on 31 PFRs Denied; Further Analysis

**Figure 3.7a: Disposition of Petitions for Review Denied; Further Analysis
(Not including furlough appeals)**



Based on 26 PFRs Denied; Further Analysis

Table 6: Disposition of Petitions for Review of Initial Decisions, by Agency*

	Decided		Dismissed		Settled		Denied		Denied; Further Analysis		Granted	
	#		#	%	#	%	#	%	#	%	#	%
Department of the Army	1,993		27	1.35	0	0.00	1,949	97.79	5	0.25	12	0.60
Department of the Air Force	151		1	0.66	0	0.00	145	96.03	1	0.66	4	2.65
Office of Personnel Management	110		7	6.36	5	4.55	79	71.82	4	3.64	15	13.64
Department of Veterans Affairs	97		8	8.25	1	1.03	71	73.20	0	0.00	17	17.53
United States Postal Service	84		6	7.14	1	1.19	66	78.57	0	0.00	11	13.10
Department of the Navy	71		1	1.41	1	1.41	56	78.87	3	4.23	10	14.08
Department of Homeland Security	67		2	2.99	1	1.49	50	74.63	1	1.49	13	19.40
Department of Health and Human Services	62		3	4.84	0	0.00	53	85.48	3	4.84	3	4.84
Department of the Treasury	61		0	0.00	1	1.64	58	95.08	0	0.00	2	3.28
Department of Transportation	48		1	2.08	0	0.00	43	89.58	0	0.00	4	8.33
Department of Defense	46		4	8.70	0	0.00	34	73.91	1	2.17	7	15.22
Department of Justice	32		1	3.13	1	3.13	20	62.50	4	12.50	6	18.75
Department of the Interior	24		1	4.17	0	0.00	14	58.33	2	8.33	7	29.17
Department of Agriculture	16		1	6.25	1	6.25	12	75.00	1	6.25	1	6.25
Department of Labor	13		1	7.69	0	0.00	7	53.85	2	15.38	3	23.08
Social Security Administration	13		1	7.69	1	7.69	7	53.85	0	0.00	4	30.77
Department of Commerce	12		0	0.00	0	0.00	10	83.33	1	8.33	1	8.33
Department of State	6		0	0.00	0	0.00	6	100	0	0.00	0	0.00
Department of Housing and Urban Development	5		1	20.00	0	0.00	4	80.00	0	0.00	0	0.00
General Services Administration	5		0	0.00	0	0.00	2	40.00	1	20.00	2	40.00
Department of Energy	4		0	0.00	0	0.00	4	100	0	0.00	0	0.00
Environmental Protection Agency	4		2	50.00	1	25.00	1	25.00	0	0.00	0	0.00
Agency for International Development	3		0	0.00	0	0.00	3	100	0	0.00	0	0.00
Federal Deposit Insurance Corporation	3		0	0.00	0	0.00	1	33.33	1	33.33	1	33.33
Government Printing Office	3		0	0.00	0	0.00	3	100	0	0.00	0	0.00
National Aeronautics and Space Administration	3		0	0.00	1	33.33	2	66.67	0	0.00	0	0.00

* This table includes both furlough and non-furlough appeals.

Table 6: Disposition of Petitions for Review of Initial Decisions, by Agency (Cont.)

	Decided		Dismissed		Settled		Denied		Denied; Further Analysis		Granted	
	#		#	%	#	%	#	%	#	%	#	%
Office of Special Counsel	3		0	0.00	0	0.00	3	100	0	0.00	0	0.00
Merit Systems Protection Board	2		2	100	0	0.00	0	0.00	0	0.00	0	0.00
Pension Benefit Guaranty Corporation	2		0	0.00	0	0.00	2	100	0	0.00	0	0.00
Small Business Administration	2		0	0.00	0	0.00	0	0.00	1	50.00	1	50.00
Smithsonian Institution	2		0	0.00	0	0.00	2	100	0	0.00	0	0.00
Tennessee Valley Authority	2		0	0.00	0	0.00	2	100	0	0.00	0	0.00
Consumer Product Safety Commission	1		0	0.00	0	0.00	1	100	0	0.00	0	0.00
Department of Education	1		0	0.00	0	0.00	1	100	0	0.00	0	0.00
Federal Communications Commission	1		0	0.00	0	0.00	1	100	0	0.00	0	0.00
Federal Election Commission	1		0	0.00	0	0.00	1	100	0	0.00	0	0.00
Federal Reserve System	1		0	0.00	0	0.00	1	100	0	0.00	0	0.00
Federal Retirement Thrift Investment Board	1		0	0.00	0	0.00	1	100	0	0.00	0	0.00
Inter-American Foundation	1		0	0.00	0	0.00	0	0.00	0	0.00	1	100
Judicial Branch	1		0	0.00	0	0.00	1	100	0	0.00	0	0.00
National Credit Union Administration	1		0	0.00	0	0.00	0	0.00	0	0.00	1	100
National Science Foundation	1		0	0.00	0	0.00	1	100	0	0.00	0	0.00
Nuclear Regulatory Commission	1		0	0.00	0	0.00	1	100	0	0.00	0	0.00
Peace Corps	1		0	0.00	0	0.00	1	100	0	0.00	0	0.00
Railroad Retirement Board	1		0	0.00	0	0.00	1	100	0	0.00	0	0.00
Securities and Exchange Commission	1		0	0.00	0	0.00	1	100	0	0.00	0	0.00
TOTAL	2,963		70	2.36	15	0.51	2,721	91.83	31	1.05	126	4.25

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SIGNIFICANT BOARD DECISIONS AND COURT OPINIONS ISSUED IN FY 2015

Several of the Board's noteworthy decisions issued in FY 2015 are summarized below. As a service to our stakeholders, we also have provided brief summaries of selected significant opinions issued by the U.S. Court of Appeals for the Federal Circuit, other U.S. Federal Courts of Appeals (e.g., under the WPEA), and the U.S. Supreme Court.¹³

Significant Board Decisions Issued in FY 2015

Jurisdiction

Wilson v. Department of Homeland Security, [2015 MSPB 20](#), 122 M.S.P.R. 262 (2015): At issue in this interlocutory appeal was whether the Board had jurisdiction over the appellant's demotion from her Supervisory Coordination Center Officer position with the Transportation Security Administration (TSA). Under 49 U.S.C. § 44935, TSA screeners are not entitled to appeal adverse actions to the Board. The Board held that, because the appellant did not directly perform screening functions, she was not a screener for purposes of section 44935. Therefore, she was entitled to appeal her demotion to the Board.

West v. Department of Health & Human Services, [2015 MSPB 34](#), 122 M.S.P.R. 434 (2015): The appellant argued that the Board had jurisdiction over the appeal because the agency terminated her for pre-appointment reasons without following the procedures set forth in 5 C.F.R. § 315.805. The appellant contended that her termination was based on conditions arising before her appointment because a memorandum from her supervisor recommending her termination for unacceptable performance during her probationary period mentioned her supervisor's concerns about hiring the appellant due to her lack of certain prior work experience. The Board disagreed, determining that the agency did not terminate the appellant due to her lack of prior experience but, rather, because of her poor performance during her probationary period. The Board ultimately affirmed the initial decision dismissing the appellant's probationary termination appeal for lack of jurisdiction.

Fouks v. Department of Veteran Affairs, [2015 MSPB 37](#), 122 M.S.P.R. 483 (2015): Several months after appointing the appellant to a GS-13, step 8 position, the agency notified him that an error had been made in setting his grade and pay and that he only had been entitled to be paid at the GS-12, step 10 level. The administrative judge (AJ) issued an initial decision dismissing the appellant's appeal of his reduction in grade and pay for lack of jurisdiction based on 5 C.F.R. § 752.401(b)(15), which provides that the Board's adverse action appeal process under 5 U.S.C. chapter 75 does not apply to the reduction of an employee's rate of basic pay from a rate that is contrary to law or regulation. The Board reversed the initial decision, finding that the exclusion contained in 5 C.F.R. § 752.401(b)(15) is specific to a reduction in an employee's rate of basic pay and does not preclude the application of chapter 75 to the appellant's reduction in grade.

Jonson v. Federal Deposit Insurance Corporation, [2015 MSPB 36](#), 122 M.S.P.R. 454 (2015): Based on his alleged failure to satisfy several debts to Federal Deposit Insurance Corporation (FDIC)-insured institutions, the agency removed the appellant for violating its regulations at 12 C.F.R. part 336, subpart B, governing minimum standards of fitness for employment, which prohibit "a pattern or practice of defalcation." In a previous decision on interlocutory review, a majority of the Board, with Member Robbins dissenting, held that the agency had the authority to promulgate regulations

¹³ As a reminder, although we include summaries of selected Board decisions from early FY 2016, the preceding section on case processing statistics include only cases processed in FY 2015.

governing employee misconduct; the agency was required to obtain the approval of the U.S. Office of Government Ethics (OGE) before promulgating the regulations but failed to do so; and the Board has jurisdiction to review the appellant's removal. (Member Robbins agreed with the Board regarding the latter ruling.) The Board reversed the appellant's removal, finding that the action was not in accordance with law because it was based on regulations that were not promulgated with the required OGE concurrence. *Jonson v. Federal Deposit Insurance Corporation (Jonson I)*, 121 M.S.P.R. 56, ¶¶ 16-17 (2014).

After the Board issued its decision, the agency submitted a declaration from OGE stating that the FDIC was not required to obtain its concurrence prior to promulgating the minimum fitness regulations. As a matter of comity, the Board deferred to OGE's determination that its concurrence in the FDIC's minimum fitness regulations was not required and overruled its contrary holding in *Jonson I*. The Board further found that the agency's prohibition on a pattern or practice of defalcation is a valid exercise of its regulatory authority under the Resolution Trust Corporation Completion Act and that removal is the mandatory penalty for a pattern and practice of defalcation under that statute. Accordingly, the Board remanded the appeal for further adjudication, instructing the AJ not to mitigate the penalty of removal if the agency proved both the charge and that the appellant's removal would promote the efficiency of the service.

Sherman v. Department of Homeland Security, [2015 MSPB 52](#), 122 M.S.P.R. 644 (2015): The appellant filed a series of grievances alleging that his FY 2013 performance evaluation was lowered in retaliation for his disclosing Federal contracting violations. He subsequently filed a complaint with the Office of Special Counsel (OSC), alleging that the agency retaliated against him for the disclosure by lowering his performance evaluation and by not granting him a cash award. When OSC declined to take corrective action, the appellant filed an individual right of action (IRA) appeal, which the AJ dismissed for lack of jurisdiction. On review, the Board found that the appellant made a nonfrivolous allegation that his disclosure was a contributing factor in his lowered performance evaluation, but that his election to grieve the performance evaluation foreclosed the Board's jurisdiction over that personnel action. In reaching that conclusion, the Board considered the appellant's argument that his grievances did not constitute an election of remedies for purposes of 5 U.S.C. § 7121(g), because he did not raise whistleblowing reprisal as an issue in his grievances. The Board rejected that argument, finding that an employee may not escape the election requirement of 5 U.S.C. § 7121(g) by challenging the same action on different theories in different fora. The Board vacated the initial decision and remanded the case for further development of the record concerning the denial of the cash award.

Compliance

Bills v. Department of the Air Force, [2015 MSPB 25](#), 122 M.S.P.R. 367 (2015): To demonstrate compliance with a Board order directing the agency to cancel the appellant's removal, retroactively restore the appellant to her position, and pay her back pay and interest in accordance with OPM regulations, the Board ruled that the agency was not required to show that it informed the Thrift Savings Program record keeper of the back pay award or that it requested the Federal Retirement Thrift Investment Board to provide a computation of interest and lost earnings. The Board noted that the regulations imposing these requirements, 5 C.F.R. §§ 1606.3 and 1606.11, were no longer valid after August 31, 2003, and that the new governing regulation, 5 C.F.R. § 1605.13, does not impose such requirements.

Adverse Action Charges

Prouty and Weller v. General Services Administration, [2014 MSPB 90](#), 122 M.S.P.R. 117 (2014): The appellants appealed their removals from their positions as Regional Commissioners after the agency's Office of the Inspector General issued a report finding that excessive spending occurred at the agency's 2010 Western Regional Conference. The Board, in affirming the AJ's decision to reverse the appellant's removals, held that, although the decisions made in planning and carrying out the conference reflected "a level of extravagance that [has] no place in government," the agency failed to prove that either appellant knew, or had reason to know, of the planning decisions.

Goeke and Bottini v. Department of Justice, [2015 MSPB 1](#), 122 M.S.P.R. 69 (2015): The appellants appealed their suspensions based on allegations that they committed professional misconduct during the criminal prosecution of a United States Senator. During the agency's disciplinary process, the agency violated its internal disciplinary rules by substituting a new proposing official for the original official. The original official had determined that discipline was not warranted. The AJ reversed the suspensions, finding that the agency's decision to change the proposing official was a harmful procedural error because it led to discipline harsher than that which otherwise would have been imposed. The Board affirmed the AJ's decision to reverse the suspensions based on harmful procedural error, without reaching the merits of the substantive charges against the appellants.

Boo v. Department of Homeland Security, [2014 MSPB 86](#), 122 M.S.P.R. 100 (2014): The agency removed the appellant from his Financial Specialist position with the TSA based on charges of undermining security procedures and misrepresentation. The charges arose from an incident in which a General Services Administration (GSA) representative was allowed to pass through a TSA security screening checkpoint without being screened based on the appellant's incorrect statement to a Transportation Security Officer (TSO) and a Supervisory Transportation Security Officer (STSO) that the TSA's Federal Security Director had authorized the GSA representative to bypass screening at the checkpoint. The AJ affirmed the appellant's removal, sustaining the misrepresentation charge based on her finding that the appellant had acted with the intent to deceive the TSO and STSO. Relying on the elements of falsification established by the Federal Circuit in *Leatherbury v. Department of the Army*, 524 F.3d 1293 (Fed. Cir. 2008), the Board held that, to sustain a charge of misrepresentation, an agency must prove that the appellant intended to defraud, deceive, or mislead the agency "for his own private material gain." Applying this standard, the Board found that there was no evidence that the appellant made the statement to the TSO and STSO for his own private material gain. Therefore, the Board did not sustain the misrepresentation charge. The Board mitigated the penalty to a 30-day suspension, finding that this was the maximum reasonable penalty for the sustained charge of undermining security procedures.

Whistleblower Protection

Webb v. Department of the Interior, [2015 MSPB 6](#), 122 M.S.P.R. 248 (2015): The appellant alleged that he was subjected to several adverse personnel actions because he wrote a position paper advocating for a different proposed agency organizational restructuring and because he sent e-mails expressing concern with certain proposed agency changes. The AJ denied the appellant's request for corrective action. The Board agreed with the AJs' decision to deny the appellant's request for corrective action, holding that he did not make any protected disclosures. The Board stated that general philosophical or policy disagreements with agency decisions or actions do not constitute protected disclosures unless there is a reasonable belief that the disclosure evidences one of the categories of wrongdoing set forth in 5 U.S.C. § 2302(b)(8)(A).

Miller v. Federal Deposit Insurance Corporation, [2014 MSPB 83](#), 122 M.S.P.R. 3 (2014): The appellant filed an IRA appeal alleging that the agency retaliated against him for disclosures he made during an internal grievance process. Such reprisal is a PPP under 5 U.S.C. § 2302(b)(9)(A)(i). The alleged reprisal occurred before the enactment of the WPEA, which extended the IRA appeal right to include not only PPPs described in 5 U.S.C. 2302(b)(8), i.e., reprisal for whistleblowing, but also to PPPs described in (b)(9)(A)(i), (B), (C) and (D). The Board held the new appeal right created by the WPEA pertaining to PPPs described in 5 U.S.C. § 2302(b)(9)(A)(i) did not apply retroactively and, therefore, the appellant could not bring an IRA appeal based on activity protected under 5 U.S.C. § 2302(b)(9)(A)(i) regarding events that occurred before the effective date of the WPEA.

Linder v. Department of Justice, [2014 MSPB 84](#), 122 M.S.P.R. 14 (2014): The appellant filed an IRA appeal alleging that he was reassigned in reprisal for disclosing in a motion to dismiss a criminal indictment that agency officials were interfering with his ability to defend himself against the charges by threatening to bring criminal charges and adverse employment actions against his potential witnesses in his criminal trial. The AJ dismissed the appeal for lack of jurisdiction, finding that the appellant's disclosures did not constitute protected activity under 5 U.S.C. § 2302(b)(9) pertaining to the exercise of any appeal, complaint, or grievance. The Board agreed that the appellant's disclosure did not fall within the protections of 5 U.S.C. § 2302(b)(9) because the WPEA did not change Board precedent regarding the meaning of the terms "appeal, complaint, and grievance" in the statute, and filing a motion to dismiss an indictment does not constitute an initial step toward taking legal action against an employer for a perceived violation of employment rights. The Board found, however, that the appellant's disclosure was covered by 5 U.S.C. § 2302(b)(8) as an allegation of an abuse of authority, and it remanded the appeal for further proceedings.

Lu v. Department of Homeland Security, [2015 MSPB 28](#), 122 M.S.P.R. 335 (2015): At issue before the Board on interlocutory appeal was the appropriate scope of review of a prior disciplinary action in the context of an IRA appeal. Under *Bolling v. Department of the Air Force*, 9 M.S.P.R. 335, 339-40 (1981), the Board's review of prior discipline upon which the agency has relied in taking an appealable adverse action is limited to whether the discipline was clearly erroneous. The Board held that the *Bolling* standard does not apply in the context of a reprisal claim and, therefore, this standard does not apply in an IRA appeal.

Kerrigan v. Department of Labor, [2015 MSPB 42](#), 122 M.S.P.R. 545 (2015): The appellant filed an IRA appeal alleging that the Office of Workers' Compensation (OWCP) terminated his benefits under the Federal Employee's Compensation Act (FECA) in retaliation for his disclosure that OWCP employees engaged in illegal activity. The AJ dismissed the appeal for lack of jurisdiction, finding that because the appellant was not himself an OWCP employee, his disclosure was not protected and the termination of his benefits was not a "personnel action" for purposes of the Whistleblower Protection Act (WPA). On PFR, the Board vacated the initial decision and dismissed the appeal on other grounds, finding that the Board lacks jurisdiction over a claim that the agency committed whistleblower reprisal by terminating FECA benefits, because 5 U.S.C. § 8128(b) precludes the Board from reviewing a decision by OWCP to pay or deny benefits.

Rainey v. Department of State, [2015 MSPB 49](#), 122 M.S.P.R. 592 (2015): The appellant filed an IRA appeal alleging that the agency stripped him of certain job duties and gave him a poor performance rating after he refused to follow an order that would have required him to violate Federal Acquisition regulations and training certification procedures. Citing the Supreme Court's recent decision in *Department of Homeland Security v. McLean*, 135 S. Ct. 913 (2015), the AJ dismissed the appeal for lack of jurisdiction, finding that 5 U.S.C. § 2302(b)(9)(D), which protects employees from retaliation "for refusing to obey an order that would require the individual to violate a law,"

concerns orders that would require the employee to take an action barred by statute, and does not extend to orders that would require the employee to violate an agency rule or regulation. The full Board agreed and affirmed the initial decision.

Rebstock Consolidation v. Department of Homeland Security, [2015 MSPB 53](#), 122 M.S.P.R. 661 (2015): The appellants in this consolidated case filed IRA appeals alleging that the agency violated 5 U.S.C. § 2302(b)(9)(D) by threatening them with disciplinary action if they refused to follow agency memoranda concerning the exercise of prosecutorial discretion in enforcing Federal immigration law. The AJ dismissed the appeals for lack of jurisdiction because the underlying events occurred before the effective date of the WPEA, which expanded Board jurisdiction to include IRA appeals alleging violations of 5 U.S.C. § 2302(b)(9)(D). The Board affirmed. Consistent with previous Board decisions declining to give retroactive effect to WPEA provisions expanding IRA appeal rights to alleged violations of 5 U.S.C. § 2302(b)(9)(A)(i), (B), or (C), and applying the analytical framework set forth in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the Board declined to give retroactive effect to the expansion of IRA jurisdiction to alleged violations of 5 U.S.C. § 2302(b)(9)(D), because doing so would increase a party's liability for past conduct. The Board agreed with the AJ that the appellants failed to nonfrivolously allege that an individual with authority "threatened" to take disciplinary action against them, noting that generalized assertions and fears of discipline without reference to any specific matter fall below the modest standard for alleging a threatened personnel action.

Discrimination

Thome v. Department of Homeland Security, [2015 MSPB 27](#), 122 M.S.P.R. 315 (2015): The appellant, a Customs and Border Protection Officer (CBPO), began working light duty during her pregnancy and continued to do so after the birth of her child due to concerns that she might be exposed to contaminants that could be transmitted to her child through breast milk. The agency removed the appellant on a charge of unavailability for full performance of CBPO duties. On appeal, the appellant raised claims of disability discrimination and sex discrimination under Title VII of the Civil Rights Act and the Pregnancy Discrimination Act (PDA), which amended Title VII by expanding the definition of discrimination to include discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions." In support of her disability discrimination claim, the appellant asserted that she was an individual with a disability because her lactation substantially limited her ability in the major life activity of working, as she was unable to safely breastfeed her child while performing full duty. The Board disagreed, noting that the Equal Employment Opportunity Commission (EEOC) has clarified that pregnancy is not an "impairment" within the meaning of the Americans with Disabilities Act (ADA) and is therefore not itself a disability, although pregnancy-related conditions may be covered. Similarly, the Board found, lactation is not an impairment and therefore not itself a disability. The Board also noted that the appellant did not allege that she suffered any medical impairments related to lactation, and it found that, to the extent that she contended breastfeeding was a matter of medical necessity for her child, any disability would be that of the child alone. Regarding the appellant's sex discrimination claim, the Board noted that the circuit courts have been divided on the question of whether the PDA permits a "pregnancy neutral" policy of granting light duty exclusively to employees who have on-the-job injuries and/or disabilities under the ADA. The Board remanded the appellant's PDA-based sex discrimination claim to the regional office for further adjudication upon the issuance of the Supreme Court's then-pending opinion in *Young v. United Parcel Services, Inc.*, 135 S. Ct. 1338 (2015), which involved a potentially dispositive PDA issue.

Savage v. Department of the Army, [2015 MSPB 51](#), 122 M.S.P.R. 612 (2015): The Board reconsidered its approach to Title VII claims in light of the Supreme Court's decision in *University of Texas*

Southwestern Medical Center v. Nassar, 133 S. Ct. 2517 (2013), which held that claims arising under 42 U.S.C. § 2000-3(a), which prohibits retaliation for certain protected equal employment opportunity (EEO) activities, are subject to a “but for” causation standard.

The Board first concluded that *Nassar* does not apply to Title VII retaliation claims in the Federal sector. Rather, Federal sector Title VII claims, including both retaliation and status-based discrimination, fall under 42 U.S.C. § 2000e-16(a), which generally provides that personnel actions by executive agencies “shall be made free from any discrimination based on race, color, sex, religion, sex, or national origin.”

Next, the Board considered what causation standard should apply to claims arising under § 2000e-16(a). In conducting that inquiry, the Board looked to case law interpreting the parallel Federal sector Age Discrimination in Employment Act provision at 29 U.S.C. § 633a(a), which similarly provides that personnel actions by executive agencies “shall be made free from any discrimination based on age.” Citing *Ford v. Mabus*, 629 F.3d 198 (D.C. Cir. 2010), and *Wingate v. U.S. Postal Service*, 118 M.S.P.R. 566 (2012), the Board observed that a violation of 29 U.S.C. § 633a(a) is established if age was a motivating factor in the personnel action, even if it was not the “but for” cause of the action. Similarly, the Board concluded, to establish a violation of 42 U.S.C. § 2000e-16(a), it is sufficient to show that race, color, religion, sex, or national origin was a motivating factor in the personnel action. The Board reasoned that the same also is true of retaliation claims arising under 42 U.S.C. § 2000e-16(a).

The Board then considered what types of evidence could be used to establish a violation of 42 U.S.C. § 2000e-16. In addressing that question, the Board looked to *Troupe v. May Department Stores Company*, 20 F.3d 734 (7th Cir. 1994), in which the Seventh Circuit set out a taxonomy of the different kinds of evidence which, alone or in combination, may support an inference that intentional discrimination or retaliation was a motivating factor in an employment action. In addition to direct evidence, i.e., evidence that can be interpreted as acknowledgment of discriminatory or retaliatory intent, the court identified three types of circumstantial evidence: (1) miscellaneous pieces of evidence, such as suspicious timing, ambiguous statements, and behavior toward or comments directed at other employees in the protected group, which, considered together, compose a “convincing mosaic” of discrimination; (2) comparator evidence, i.e., evidence that similarly situated employees received systematically better treatment; and (3) evidence that the agency’s stated reason is unworthy of credence and is merely pretext for discrimination or retaliation. The court further clarified that none of the above types of evidence is necessary in every case. The Board adopted the *Troupe* framework, and overruled *Fitzgerald v. Department of Homeland Security*, 107 M.S.P.R. 666 (2008), and other cases in which it held that an appellant alleging EEO reprisal must establish a “convincing mosaic” of retaliation.

Next, the Board explained that while 42 U.S.C. § 2000e-16 grants enforcement authority to the courts and the EEOC, the Board’s enforcement authority instead derives from civil service law. First, 5 U.S.C. § 7702(a) provides that in mixed cases, the Board “shall decide both the issue of discrimination and the appealable action *in accordance with the Board’s appellate procedures* under [5 U.S.C. §§ 7701 and 7702].” Overruling its prior decision in *Redd v. U.S. Postal Service*, 101 M.S.P.R. 182 (2006), the Board clarified that its appellate procedures do not allow for summary judgment. As a result, the framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), which is used by the courts and the EEOC to determine whether summary judgment is appropriate, has no application to Board proceedings.

Regarding remedies, 5 U.S.C. § 7701(c)(2)(B) provides that an agency decision will not be sustained if the appellant shows that the decision was “based on” a PPP under 5 U.S.C. § 2302(b). As the Board explained in *Gerlach v. Federal Trade Commission*, 9 M.S.P.R. 268 (1981), the term “based,” as used here, “connotes that the matter referred to is the most important element.” Hence, section 7701(c)(2)(B) mandates reversal only where a PPP was *the* motivating factor or “real reason” for the action. Consequently, while the Board will find a violation of 42 U.S.C. § 2000e-16(a), and hence a PPP under 5 U.S.C. § 2302(b)(1), if the appellant shows that a discriminatory or retaliatory motive was a motivating factor in the contested action, such a finding will not necessarily result in reversal. Rather, the Board will reverse the action only if the PPP was the “but for” cause of the action.

The Board summarized its conclusions as follows:

[W]hen an appellant asserts an affirmative defense of discrimination or retaliation under 42 U.S.C. § 2000e-16, the Board first will inquire whether the appellant has shown by preponderant evidence that the prohibited consideration was a motivating factor in the contested personnel action. Such a showing is sufficient to establish that the agency violated 42 U.S.C. § 2000e-16, thereby committing a prohibited personnel practice under 5 U.S.C. § 2302(b)(1). In making her initial showing, an appellant may rely on direct evidence or any of the three types of circumstantial evidence described in *Troupe*, either alone or in combination. If the appellant meets her burden, we then will inquire whether the agency has shown by preponderant evidence that the action was not based on the prohibited personnel practice, i.e., that it still would have taken the contested action in the absence of the discriminatory or retaliatory motive. If we find that the agency has made that showing, its violation of 42 U.S.C. § 2000e-16 will not require reversal of the action.

The Veterans Employment Opportunities Act (VEOA)

Vassallo v. Department of Defense, [2015 MSPB 8](#), 122 M.S.P.R. 156 (2015): At issue in this VEOA appeal was the meaning of the term “agency” as set forth in 5 U.S.C. § 3304(f)(1), which provides that an agency may not deny individuals covered by the statute the opportunity to compete for positions for which the agency making the announcement will accept applications from individuals outside its own workforce under merit promotion procedures. The appellant, a Defense Contract Management Agency (DCMA) employee, applied for a position within a different component of DCMA in response to a vacancy announcement, which specified that only applicants from particular Department of Defense (DOD) subcomponents would be considered for the position. His application was rejected because he did not submit a Standard Form 50 with his application package. On appeal, he alleged that the agency accepted applications from outside its own workforce and, therefore, violated his veterans’ preference rights by denying him the opportunity to compete for the vacant position. The Board explained that, if the term “agency” referred only to DCMA, rather than to the DOD at large, the agency did allow applications outside its workforce so as to trigger its obligation to allow the appellant the opportunity to compete. Reversing its prior decision, the Board held that the term “agency” for purposes of section 3304(f)(1) meant “Executive agency” as defined in 5 U.S.C. § 105, and thus, DOD was the agency making the announcement. Therefore, the Board found that, because DOD did not accept applications for the position from individuals outside its own workforce under merit promotion procedures, it was not required to allow the appellant the opportunity to compete for the position.

Boston v. Department of the Army, [2015 MSPB 47](#), 122 M.S.P.R. 577 (2015): The appellant filed an appeal under VEOA, arguing that the agency violated his veterans’ preference rights when it did not

select him for an Intelligence Specialist position. In denying the appellant's request for corrective action, the Board first found that the agency was not required to apply title 5 veterans' preference rights because the Intelligence Specialist position was filled pursuant to 10 U.S.C. § 1601, which provides that appointments under that statute are made "without regard to the provisions of any other law relating to the appointment . . . of employees." The Board also found that the appellant was not entitled to veterans' preference under the applicable agency regulation, Department of Defense Instruction (DoDI) 1400.25. The Board concluded that the regulation, which provides that veterans' preference will be used as a tie breaker for external new employee hiring, is reasonable and consistent with 10 U.S.C. § 1601(a)(2), which requires the agency to consider the "availability of preference eligibles for appointment" when filling civilian defense intelligence positions.

Uniformed Services Employment and Reemployment Rights Act (USERRA)

Bostwick v. Department of Agriculture, [2015 MSPB 21](#), 122 M.S.P.R. 269 (2015): Shortly after returning to duty with the agency's Forest Service following active duty military service, the appellant transferred to a different Federal agency at his request. When he learned that he did not qualify for special retirement coverage in his new position, the appellant requested restoration to his prior position with the Forest Service. The agency denied his request and he filed a USERRA appeal alleging that he had been denied restoration to employment. The AJ denied the appellant's request for corrective action on the basis that he failed to establish that he requested reemployment with the agency after he was transferred to his new position with another agency. The Board affirmed the initial decision as modified, finding that, regardless of whether the appellant requested reemployment with the agency following his transfer, the agency satisfied its statutory obligation under USERRA to reemploy the appellant when it returned him to duty following his military service.

Stoglin v. Department of the Air Force, [2015 MSPB 43](#), 123 M.S.P.R. 163 (2015): The appellant filed an appeal in which he alleged that his nonselection for the position of Equal Employment Manager with the Hawaii Air National Guard was in violation of USERRA and VEOA. The AJ initially dismissed the appeal, but the Board remanded the case, finding that the appellant had established jurisdiction over his USERRA claim. On remand, the AJ again dismissed the appeal for lack of jurisdiction, finding that the Hawaii Air National Guard is a state agency and that the appellant must therefore bring his USERRA claim before a state court. In the alternative, the AJ found that the appellant failed to state a claim upon which relief could be granted. On petition for review, the Board reconsidered the jurisdictional issue, finding that National Guard civilian technicians are state employees for USERRA purposes and that jurisdiction over the appellant's USERRA claim lies with a state court, not the Board. Accordingly, the Board vacated both its earlier finding of jurisdiction and the AJ's alternative finding, and dismissed the appeal for lack of jurisdiction.

Furloughs

Einboden v. Department of the Navy, [2015 MSPB 26](#), 122 M.S.P.R. 302 (2015): The appellant appealed his furlough due to sequestration, claiming that he should not have been furloughed because his salary was paid out of working capital funds, not appropriated funds. After a hearing, the AJ affirmed the furlough action. The Board agreed with the AJ's determination. The Board held that the furlough was a reasonable management solution to the financial restrictions placed on the agency. The Board further stated that it was reasonable for the agency to consider its budget situation holistically, rather than to isolate individual departments' budgets.

Salo v. Department of Defense, [2015 MSPB 14](#), 122 M.S.P.R. 417 (2015): The appellant was furloughed for 6 discontinuous days due to sequestration. On appeal, he argued that the agency should have

applied the reduction-in-force (RIF) regulations of 5 C.F.R. part 351 instead of adverse action procedures, set forth at 5 C.F.R. part 752, because the 6 furlough days were spread out over a time period longer than 30 days, and agencies must conduct furloughs of more than 30 days according to the procedures of 5 C.F.R. part 351. The AJ affirmed the furlough. The Board agreed with the AJ and explained that under 5 C.F.R. § 351.203, RIF regulations apply to furloughs of more than 30 consecutive calendar days, or more than 22 discontinuous workdays. The Board found that, although the length of time that the appellant was subject to being furloughed may have lasted more than 22 discontinuous workdays, the agency actually furloughed the appellant on a discontinuous basis fewer than 22 days. Thus, the Board determined that the RIF regulations do not apply.

Retirement

Moss v. Office of Personnel Management, [2015 MSPB 19](#), 122 M.S.P.R. 257 (2015): A divorce decree awarded the appellant a portion of his former spouse's retirement annuity and a former spouse survivor annuity, with the cost of the survivor annuity to be deducted from his share of the retirement annuity. After his former spouse retired under the Civil Service Retirement System, the appellant asked OPM for permission to waive his future entitlement to the former spouse survivor annuity so that he could receive an unreduced share of his former spouse's monthly retirement annuity. The appellant filed a Board appeal of OPM's denial of his request, arguing that 5 U.S.C. § 8345(d) provides him the right to waive his entitlement to a survivor annuity at any time. The AJ affirmed OPM's reconsideration decision. On review, the Board found that 5 U.S.C. § 8345(d) does not permit a waiver of entitlement to a former spouse survivor annuity to increase the current share of a retirement benefit. Instead, the Board found that the statute allows an individual entitled to an annuity to decline to accept payment of the annuity. Such an individual remains entitled to the annuity, however, and can begin accepting payment at any time upon proper notice to OPM. The Board further found that, although OPM's regulations allow a former spouse to irrevocably elect not to be eligible for a former spouse survivor annuity when a court order provides an election right, the divorce decree at issue in this appeal awarded the appellant the survivor annuity without an election right. Therefore, OPM properly denied the appellant's request to irrevocably waive his future entitlement to the court-ordered former spouse survivor annuity. The Board concluded that the AJ properly affirmed OPM's reconsideration decision.

Angel v. Office of Personnel Management, [2015 MSPB 33](#), 122 M.S.P.R. 424 (2015): Prior to her removal for inability to perform the essential functions of her position, the appellant applied for disability retirement benefits under the Federal Employees' Retirement System. In an initial decision reversing OPM's denial of the appellant's application, the AJ found that the appellant was presumed to be entitled to disability retirement benefits pursuant to *Bruner v. Office of Personnel Management*, 996 F.2d 290, 294 (Fed. Cir. 1993), in which the Federal Circuit held that an employee's removal for physical inability to perform the essential functions of his position constitutes prima facie evidence that he is entitled to disability retirement. On review, OPM argued that the AJ erred in applying the *Bruner* presumption because the appellant did not produce copies of a Standard Form 50 effecting her removal, or the proposal or decision to remove her for inability to perform the essential functions of her position. The Board held that an appellant is not required to produce any specific documentary evidence before the *Bruner* presumption applies, and the AJ correctly applied the presumption.

The Board also rejected the agency's argument on review that the appellant failed to prove that she was qualified for disability retirement because she applied for full-time positions and held several part-time positions after she filed her disability retirement application. The Board explained that, to qualify for disability retirement benefits, the appellant was not required to show that her disability rendered her incapable of working all positions. Rather, the relevant position for determining her

qualification for retirement benefits was the position she last held before filing her application. The Board found that the appellant met her burden of proving that she was qualified for disability retirement benefits by showing that her medical condition prevented her from performing the requirements of the job she held when she applied for disability retirement benefits. The fact that she was able to work other positions with duties and responsibilities that are different from that position is immaterial to determining whether her condition affected her ability to perform the specific work requirements of the position she held at the time of her application for disability retirement benefits.

Attorney Fees

Southerland v. Department of Defense, [2014 MSPB 88](#), 122 M.S.P.R. 51 (2014): At issue in this case was whether the appellant was the “prevailing party” for attorney fees purposes even though the Board sustained all of the charges against him, found that he failed to prove his affirmative defense of disability discrimination, and upheld his removal. The appellant argued that he was entitled to attorney fees based on the Board’s finding that the deciding official’s statements in the decision letter constituted direct evidence of disability discrimination. In support of his request for attorney fees, the appellant asked the Board to defer to the EEOC’s apparent determination that, in a mixed-motive case, an appellant is considered a prevailing party for purposes of establishing an entitlement to attorney fees even if the agency proved by clear and convincing evidence that it would have taken the action against him regardless of the discriminatory motive, and even in the absence of any award of personal relief. The Board declined to do so, explaining that it generally defers to the EEOC on issues of substantive discrimination law; however, an EEOC decision regarding an attorney fees award is not a decision on an issue of substantive discrimination law. The Board concluded that, even assuming the Board’s finding regarding the statements in the decision letter was a finding of discrimination, the appellant was not a prevailing party because he received no actual relief and there was no material alteration of the legal relationship between the parties.

Penalties

Bowman v. Small Business Administration, [2015 MSPB 18](#), 122 M.S.P.R. 217 (2015): The appellant was removed based on charges of excessive unauthorized leave and failure to follow proper leave requesting procedures. The AJ sustained the charges but mitigated the penalty to a 30-day suspension, finding that the appellant’s mental impairment played a part in the charged misconduct and therefore it was entitled to considerable weight as a mitigating factor. The Board affirmed the initial decision, rejecting the agency’s argument that the AJ erred in considering evidence regarding the connection between the appellant’s mental condition and his absences that was not presented until the appellant’s hearing testimony. The Board noted that in *Norris v. Securities & Exchange Commission*, 675 F.3d 1349, 1355-57 (Fed. Cir. 2012), the Federal Circuit held that, where new evidence supporting mitigation of the penalty is presented to the Board, the evidence must be considered in determining whether the agency’s penalty was reasonable. Therefore, the Board found, the AJ properly considered the appellant’s hearing testimony that his depression, in part stemming from the recent death of his son, played a part in the absences that formed the basis for the charges. In his dissent, Member Robbins expressed his view that removal was a reasonable penalty for the sustained misconduct in light of the seriousness of the misconduct, the appellant’s status as a supervisor, his lack of remorse, and his work and disciplinary record, which showed that the appellant had a history of failing to comply with the agency’s leave and attendance policies.

National Security Determinations

Wilson v. Department of the Navy, [2015 MSPB 48](#), 122 M.S.P.R. 585 (2015): The appellant was removed based on the revocation of his security clearance. On appeal, he argued that his removal was a violation of USERRA and that the Supreme Court's decision in *Department of Navy v. Egan*, 484 U.S. 519 (1988), which precludes the Board from reviewing the merits of a security clearance determination in an adverse action appeal, does not apply to USERRA claims. The AJ affirmed the agency's removal action. The Board agreed with the AJ and held that *Egan* applies to affirmative defenses such as his USERRA claims as well as adverse action appeals.

Rogers v. Department of Defense, [2015 MSPB 54](#), 122 M.S.P.R. 671 (2015): The appellant was indefinitely suspended based on the suspension of his access to classified information pending the final adjudication of his security clearance. The AJ reversed the action on the ground of harmful procedural error, finding that the agency failed to comply with internal regulations that require it to afford an employee "unfavorable administrative action procedures" before taking an adverse action based on a "personnel security determination." On PFR, the Board reversed the initial decision and sustained the indefinite suspension action. In doing so, the Board clarified the distinction between a security clearance, which is a determination by an authorized adjudicatory entity that the employee is eligible for access to classified information, and actual access to classified information, which is granted by local command to cleared individuals on a need-to-know basis. The Board found that the suspension of access to classified information (pending a final adjudication of the clearance), as opposed to the suspension of a security clearance, is not a "personnel security determination" as defined by the agency's regulations and therefore the agency was not required to afford the appellant "unfavorable administrative action procedures" before it indefinitely suspended him.

Significant Opinions Issued by the U.S. Courts of Appeals in FY 2015

Archuleta v. Hopper, [786 F.3d 1340](#) (Fed. Cir. 2015): The Federal Circuit affirmed the Board, holding that suitability-based removals of tenured employees are appealable adverse actions under chapter 75. The Court also determined that deference to an agency's penalty choice is not warranted when the OPM, rather than the employing agency, makes the penalty determination. The Court also clarified that, when reviewing a suitability-based removal, the Board also has jurisdiction to review debarments and cancellations of eligibility as part of a unified penalty arising from the same set of circumstances as the removal.

After *Hopper* was decided, the President signed the National Defense Authorization Act (NDAA) in law.¹⁴ The NDAA includes a provision amending 5 U.S.C. § 7512, which sets forth the "adverse actions" that are appealable to the Board under chapter 75. Section 7512 now provides in relevant part, that "[t]his subchapter . . . does not apply to . . . (F) a suitability action taken by [OPM] under regulations prescribed by [OPM], subject to the rules prescribed by the President under this title for the administration of the competitive service."

Aviles v. Merit Systems Protection Board, [799 F.3d 457](#) (5th Cir. 2015): In a decision issued by the U.S. Court of Appeals for the Fifth Circuit pursuant to the "All-Circuit Review" provision of the Whistleblower Protection Enhancement Act (WPEA), the Court affirmed the Board's final decision, holding that disclosures of purely private misconduct are not protected disclosures covered by 5

¹⁴ The NDAA for FY 2016 (Pub. L. No. 114-92) was enacted on November 25, 2015 and can be found at <https://www.congress.gov/bill/114th-congress/senate-bill/1356/text>.

U.S.C. § 2302(b)(8). The Court stated that the WPA and WPEA protect only disclosures of government wrongdoing. The Court also declined to apply the U.S. Court of Appeals for the Federal Circuit’s standard for determining whether an allegation is nonfrivolous, analogizing it to the summary judgment standard under Rule 56 of the Federal Rules of Civil Procedure (FRCP). Instead the court adopted a motion-to-dismiss standard analogous to FRCP Rule 12, under which all well-pleaded facts are accepted as true and viewed in the light most favorable to the petitioner.

Berlin v. Department of Labor, [772 F.3d 890](#) (Fed. Cir. 2014): The Federal Circuit held that the Board properly found good cause for the Department of Labor’s (DOL’s) decision to furlough its administrative law judges (ALJs) for 5.5 days due to the Governmentwide budget sequester in 2013. The Court held that, when assessing the propriety of an ALJ furlough, “good cause” is defined on a case-by-case basis, considering such factors as: (1) whether the reason for the furlough is one that interferes with the ALJs’ judicial independence; (2) any disparate treatment; and (3) whether the agency had sound business reasons for issuing the furlough. Applying these factors, the Court held that the furloughs represented a sound business decision by the agency because it made a neutral decision to apply the cuts equally to each subaccount. According to the Court, the agency met the “good cause” standard despite the difference in furlough lengths because there was no evidence that the difference was because of the employees’ ALJ status.

Bernard v. Department of Agriculture, [788 F.3d 1365](#) (Fed. Cir. 2015): The appellant filed a petition for enforcement (PFE) and sought discovery in a case in which he alleged breach of a settlement agreement that had been entered into the record for enforcement purposes. The AJ dismissed the petition for enforcement (PFE) without responding to the appellant’s request to engage in discovery, finding that the appellant did not support his bare allegations of breach with any evidence demonstrating bad faith. The Board affirmed, concluding that parties in enforcement proceedings generally do not need to ask permission to engage in discovery, that the Board only becomes involved when a motion to compel is filed and that, because the appellant did not file a motion to compel, the AJ did not err in failing to respond to his discovery requests.

The court reversed and remanded, agreeing with the appellant that the AJ was required to respond to his discovery requests, and the failure to do so impaired the appellant’s ability to gather evidence to establish breach. In so finding, the Court observed that the Board’s regulations do not inform appellants whether they have a right in enforcement proceedings to directly engage in discovery without obtaining permission from the AJ. *See* 5 C.F.R. § 1201.183(a)(4). The Court also examined Board precedent and found no clear guarantee of the right to engage in discovery in enforcement proceedings without first obtaining the AJ’s approval. The Court concluded that, because the AJ failed to respond to the appellant’s requests to engage in discovery and the error was not harmless, remand was required.

After *Bernard* was decided, the Board issued interim regulations which provide that discovery may be undertaken in accordance with the Board’s regular discovery procedures, except that unless otherwise directed by the AJ, initial discovery requests must be served no later than 15 days after the alleged noncomplying party files a response to the petition for enforcement. 5 C.F.R. § 1201.183(a)(9).

Cobert v. Miller, [800 F.3d 1340](#) (Fed. Cir. 2015): The Federal Circuit reversed a Board decision that determined the agency failed to provide a rational basis for requiring an employee to accept a directed reassignment or prove that the employee’s removal satisfied the efficiency of the service. The court held that the Board erred in abandoning the burden-shifting approach set forth in *Ketterer v. Department of Agriculture*, 2 M.S.P.R. 294 (1980), which it stated remained the law of the circuit.

Applying *Ketterer*, the court held that the record supported the AJ's findings that: (1) the agency had legitimate management reasons for the employee's reassignment; and (2) the employee failed to rebut the agency's prima facie case. The Court concluded that the employee's failure to follow instructions bore directly on the efficiency of the service and that her removal was therefore proper.

Kerner v. Department of the Interior, [778 F.3d 1336](#) (Fed. Cir. 2015): The appellant, a preference-eligible Evidence Custodian, applied for two merit-promotion vacancies with his employing agency. Both applications were rejected because he did not meet the time-in-grade requirements necessary to be considered for the positions. The appellant appealed his nonselections to the Board, alleging that he was denied the opportunity to compete for the vacancies under VEOA because the agency did not consider his non-Federal civil service experience, and the Board affirmed the agency's decision. Thereafter, the Federal Circuit affirmed the Board's decision, holding that agencies are not required to consider non-Federal civil service experience when determining whether a veteran employed in the Federal civil service meets time-in-grade or specialized experience requirements for purposes of merit promotions. The Court explained that the purpose of VEOA was to help veterans gain access to Federal employment, not provide preferential treatment in promotion decisions.

Ryan v. Department of Homeland Security, [793 F.3d 1368](#) (Fed. Cir. 2015): The Federal Circuit held that an indefinite suspension based on a loss of security clearance is not subject to the penalty mitigation analysis under *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981). The Court also determined that Board correctly declined to order termination of the indefinite suspension following the petitioner's acquittal of criminal charges because the condition for terminating the suspension was not the acquittal, but rather the agency's final determination regarding her eligibility for access to classified information, which had not yet occurred. The Court further found that, insofar as the petitioner was alleging that the determination concerning her security clearance was unduly delayed, an agency has broad discretion to determine how much time is required to evaluate whether the revocation of a suspended clearance is appropriate. The Court also determined that neither it, nor the Board, could review the petitioner's contentions concerning the validity of the agency's reasons for revoking her clearance. Finally, the Court rejected the petitioner's contention that she was entitled to new notice when the basis for the indefinite suspension implicitly became the revocation, rather than the suspension, of her clearance. The Court observed that the suspension of the petitioner's clearance was based on her inability to access classified information and that the revocation of her clearance made this inability permanent.

Significant Opinions Issued by the U.S. Supreme Court in FY 2015

Department of Homeland Security v. MacLean, [135 S.Ct. 913](#) (2015): The Supreme Court affirmed a Federal Circuit ruling that the agency unlawfully removed an Air Marshal for in reprisal for disclosing lapses in aviation security. The WPA provides that whistleblower protections do not extend to a disclosure "specifically prohibited by law." The agency argued that the Air Marshall's disclosures were specifically prohibited by law because they involved "Sensitive Security Information," a category of information created solely by the agency's regulations. The Federal Circuit vacated the Board's decision that upheld the removal action. The Supreme Court affirmed the Federal Circuit, holding that a disclosure "specifically prohibited by law" must be expressly barred by the statute itself, not merely by an agency rule or regulation. Because the Air Marshall's disclosures were not specifically prohibited by law, the Court held that his removal for having made them violated the WPA.

Significant Board Decisions and Court Opinions Issued in Early FY 2016

Kitlinski v. Department of Justice, [2015 MSPB 60](#): The appellant filed an appeal in which he alleged that, after he drove his personally owned vehicle to the agency's headquarters to attend a deposition in his EEO complaint, he discovered a Blackberry device concealed under the hood of his car. He contended that it was the same Blackberry model that the agency used for voice recording and electronic tracking and monitoring. In his USERRA appeal, he alleged discrimination, a hostile work environment, and retaliation based upon the exercise of his USERRA rights. The AJ issued an initial decision dismissing the USERRA appeal for lack of jurisdiction. On review, the Board affirmed the initial decision as modified, finding that the appellant failed to nonfrivolously allege that the agency's purported conduct was based on his military status or that the agency subjected him to a hostile work environment in violation of USERRA.

Dean v. Department of Labor, [808 F.3d 497](#) (Fed. Cir. 2015): The Federal Circuit held that the Board has jurisdiction to consider violations of 5 U.S.C. §§ 3302(1) and 3308 pursuant to section 3330a of VEOA because sections 3302(1) and 3308 are statutes relating to veterans' preference. In so holding, the Court affirmed the Board's implicit finding that section 3302(1) is a statute relating to veterans' preference, but reversed the Board's explicit finding that section 3308 is not a statute relating to veterans' preference. The Court further determined that the placement of the "Recent Graduate" Wage and Hour Specialist position into the excepted service as part of the Pathways Recent Graduates Program and the program's minimal education requirement of a college degree did not violate Mr. Dean's veterans' preference rights under either section 3302(1) or section 3308, given that there was ample justification in the record showing a rational basis for that educational requirement. The Federal Circuit affirmed the Board's denial of corrective action.

McCarthy v. Merit Systems Protection Board, Fed. Cir. Docket No. [2015-3072](#) (Jan. 14, 2016): The Federal Circuit affirmed a Board determination not to reopen an appeal after the Board had issued a decision in the case. Here, the motion to reopen asserted that a change in the law—the enactment of the WPEA—required a different result than the previously decided Board decision, which the Court had affirmed on the merits. The Court concluded that it did have jurisdiction to review the Clerk of the Board's letter denying the motion to reopen. The Court rejected the Board's arguments that a letter from the Clerk's Office is not a final appealable decision or order. In so finding, the Court distinguished its prior holding in *Haines v. Merit Systems Protection Board*, 44 F.3d 998, 1000 (Fed. Cir. 1995), as applying only in instances of multiple requests to reopen, and not where the Clerk's letter denies a first motion to reopen premised on a change in the law. The Court also held that a strong presumption exists in favor of judicial review of administrative action and rejected the Board's contention that the "broad and standardless" language of 5 U.S.C. § 7701(e)(1)(B) [any decision shall be final unless—“(B) the Board reopens and reconsiders a case on its own motion.”] precludes judicial review under § 702(a)(2) of the Administrative Procedures Act. Rather, the Court looked to established Board practice, regulations, and case law as supplying the necessary standards for reviewing a Board decision on a motion to reopen.

SUMMARY OF MERIT SYSTEMS STUDIES ACTIVITY IN FY 2015

In addition to adjudicating appeals, MSPB is charged with conducting studies of the civil service and merit systems. MSPB's high-quality, objective merit systems studies provide value by assessing current management policies and practices, identifying innovative and effective merit-based management policies and practices, and making recommendations for improvements. These factors also help reduce the occurrence and costs of PPPs that negatively affect agency and employee performance. Overall, this benefits American taxpayers in terms of decreased Governmentwide costs and increased confidence that the Government is doing its job and appropriately managing the workforce.

MSPB research was cited in a wide range of online and print publications. Notably, MSPB's merit systems studies reports were cited in a number of policy-making sources including two GAO reports¹⁵, one on using the probationary period to manage poor performers (*Addressing Poor Performers and the Law*), and one on improving employee engagement (*The Power of Employee Engagement*), and in GAO testimony on improving engagement of Federal employees.¹⁶ In Congressional testimony on the floor of the House and in a Congressional blog, Representative Mark Takano quoted the MSPB studies report *What Is Due Process in Federal Civil Service Employment?* (linked below) in regard to pending legislation on the VA Accountability Act of 2015.¹⁷ OPM also cited MSPB engagement reports in a white paper on how to engage the Federal workforce.¹⁸

During FY 2015, MSPB merit systems studies' staff conducted 38 outreach events with Federal employees, supervisors and managers, agency representatives and attorneys, and international visitors regarding Federal merit systems, the statutory roles of MSPB, and issues, findings, and recommendations from merit system studies and OPM oversight. For example, studies' staff members were invited to present on Veterans' employment rights at the Federal Dispute Resolution Conference, as well as briefings on employee engagement for OPM's Virtual Human Resources Conference and a retreat for OPM senior management organized by the Federal Executive Institute. MSPB studies' staff members were invited to present to the Federally Employed Women National Training Program and the Federal Asian Pacific American Council National Leadership Training Program on preventing favoritism and discrimination. Federal News Radio broadcasted several interviews with MSPB studies' staff regarding recently released reports.

In FY 2015, MSPB published three new merit systems study reports:

- [*Veterans' Employment Redress Laws in the Federal Civil Service*](#)
- [*The Impact of Recruitment Strategy on Fair and Open Competition for Federal Jobs*](#)
- [*What is Due Process in Federal Civil Service Employment?*](#)

In FY 2015, MSPB also finalized the 2015-2018 research agenda. The published [research agenda](#) discusses how the agenda was developed and provides brief summaries of 34 topics that MSPB considers appropriate for study based on four criteria: centrality, timeliness, ambition, and practicality. The three merit systems study reports published in FY 2015 and a summary of a report published in early FY 2016 are summarized in this section of the Annual Report.

¹⁵ <http://www.gao.gov/assets/670/668339.pdf> and <http://www.gao.gov/assets/680/671396.pdf>

¹⁶ <http://webcache.googleusercontent.com/search?q=cache:NFGtS-Ga860J:www.gao.gov/assets/670/669676.pdf+&cd=1&hl=en&ct=clnk&gl=us>

¹⁷ <https://www.congress.gov/congressional-report/114th-congress/house-report/225/1>

¹⁸ <https://dl.dropboxusercontent.com/u/29440904/SBR/Engaging%20the%20Federal%20Workforce.pdf>

In FY 2015, MSPB published other products including:

- *Issues of Merit (IoM)* newsletters – Newsletters inform Federal leaders, employees, and stakeholders about merit systems and Federal management issues and practices through articles that discuss current MSPB research and reports, noteworthy agency practices, and Federal HR policies and initiatives.
- *Individual, electronic “flash” articles* – These articles on selected merit systems or workforce management topics are posted on the MSPB website at a time or in a format the *IoM* does not readily accommodate.
- *Research Highlights* – These are one-page summaries of published MSPB studies. Several *Research Highlights* also have been compiled into a “catalog” of MSPB studies.
- *Mini-briefings* – Short presentations about selected MSPB studies.

Summaries of Reports Released in FY 2015

[*Veterans’ Employment Redress Laws in the Federal Civil Service*](#) (November 2014) reviews statutes and case law to educate Federal agencies, job applicants, and stakeholders about two laws concerning the hiring and reemployment of veterans in the Federal service. Proper understanding and administration of these laws is essential both to fair and legally compliant treatment of veterans and avoiding the appearance or reality of unauthorized preferential treatment. The Veterans Employment Opportunities Act of 1998 (VEOA) provides an avenue for veterans to seek redress for violations of their preference rights or right to consideration for certain vacancies. The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) provides for redress for individuals who experience discrimination based on a military service obligation or are denied reemployment rights following such service. (Related MSPs: 2, 4, 5, and 8; PPPs: 4, 5, 6 and 11.)

[*The Impact of Recruitment Strategy on Fair and Open Competition for Federal Jobs*](#) (January 2015) reviews the implementation, in policy and practice, of the principle of fair and open competition for staffing positions in the Federal service. Although the principle of fair and open competition is enduring, changes in technology and policy—which include the ability to apply for jobs electronically, the near-complete decentralization of Federal hiring and a proliferation of noncompetitive hiring authorities that can be used to fill positions in the competitive service—have materially changed the nature and extent of job competitions. This report discusses the ideal and implementation of fair and open competition, examines how changes to civil service policy are affecting job competitions and their outcomes, and explores whether changes to policy or practice are needed. (Related MSPs: 1, 2, and 5; PPPs: 1, 2, 4, 5, and 6.)

[*What is Due Process in Federal Civil Service Employment?*](#) (May 2015) explains the interaction between the U.S. Constitution and adverse personnel actions in a merit-based civil service, discussing the history, rationale, and provisions of current civil service law for adverse actions. The report outlines the constitutional requirements of any system to remove a public employee for cause: (1) an opportunity for the individual to know the charges and present a defense; and (2) the ability to appeal a removal decision before an impartial adjudicator. The report’s appendix presents selected information on policy and practice to correct some common misperceptions about how the civil service currently operates. (Related MSPs: 4, 5, 6, and 9; PPPs: 1, 3, 8, and 9.)

Summaries of Reports Released in Early FY 2016

[*Training and Development for the Senior Executive Service: A Necessary Investment*](#) (December 2015) examines current practices on how career senior executives—who manage major programs and organizations and provide continuity during Presidential transitions—are trained and developed. Unfortunately, the review indicates that the “systematic development” envisioned in the Civil Service Reform Act of 1978 is more vision than reality. To that end, the report contains information to help agencies determine a development strategy that aligns with agency goals and resources and effectively addresses executives’ training needs. In addition, the report discusses common barriers to SES training and offers strategies to mitigate them.

FY 2015 *Issues of Merit* Newsletter Topics

MSPB published three editions of the *Issues of Merit* newsletter and three other short articles on the MSPB studies flash page. MSPB also issued, through the studies flash page, [*Adverse Actions: The Rules and The Reality*](#), an eight-page monograph that draws on published and nonpublished research to provide insight on how agencies decide about and take adverse actions and inform the ongoing policy debate over Federal employee accountability and protections. Products of this type fill a gap between the *Issues of Merit* newsletter and a study report, providing MSPB with a vehicle to explore issues of policy or practice with more depth than a short article and more immediacy than a full-length report.

The Merit Systems Studies Research Agenda for FY 2015 - 2018

In FY 2015, MSPB finalized its merit systems studies research agenda. The research agenda guides MSPB in conducting objective, nonpartisan studies that assess and evaluate Federal merit systems policies, operations, and practices. 5 U.S.C. § 1204(a)(3). The goal of the review was a research agenda that addresses both continuing imperatives, such as achieving a workforce free of prohibited personnel practices, and contemporary issues, such as making the best possible use of advances in technology and the impact of policy changes on the Federal workforce. The agenda was developed through an open and deliberative process that included a [call for ideas](#) and input from interested citizens, a public meeting at which the Board Members and key stakeholders discussed the proposed agenda, and formal approval by the Board. The [final research agenda](#) for 2015-2018 was approved by the Board Members in January 2015 and published in February 2015.

2016 Merit Principles Survey (MPS)

MSPB made significant progress toward the next administration of MSPB’s flagship survey, the MPS, with administration scheduled for mid-2016. MSPB administers the MPS to obtain Federal employees’ perceptions and experiences regarding the health of merit in the workplace, occurrence of PPPs, and other topics in support of MSPB’s studies program.

MSPB’s Cloud-based Survey Capability

MSPB completed, with support from Department of the Interior’s National Business Center, a solicitation for a survey capability to support agency performance improvement under GPRAMA and merit system studies under 5 U.S.C. § 1204. No responses were received, which may reflect the solicitation’s necessary and substantial technical requirements in relation to its dollar value. MSPB has placed this initiative on hold to focus on the 2016 MPS and research, in coordination with IRM, policy guidelines and technical issues related to shared services available through the Office of Management and Budget (OMB; e.g., MAX Survey).

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SIGNIFICANT ACTIONS OF THE U.S. OFFICE OF PERSONNEL MANAGEMENT IN FY 2015

As required by statute,¹⁹ MSPB reviews and reports on the significant actions of OPM including an analysis of whether OPM's actions are in accord with MSPs²⁰ and free from PPPs.²¹ OPM's actions broadly affect the Federal workforce, multiple Federal agencies, and applicants for Federal jobs. Almost all of OPM's actions have the potential to impact the effectiveness and efficiency of the Federal workforce (MSP 5) and/or fair and equitable treatment in a variety of contexts (MSP 2). Depending on the nature of a particular OPM action, it has the potential to affect or involve other specific MSPs. Additional MSPs that may be affected by a particular OPM action are noted in each action's 'Significance' section.²² In addition to tracking OPM's action we also requested input from OPM on significant actions.

Factors Affecting the U.S. Office of Personnel Management

This review should be read in the context of issues and developments that directly affect OPM and can indirectly affect the nature and scope of the OPM policy initiatives that are the primary focus of MSPB's review.

Data Breaches. During FY 2015, OPM experienced data breaches of two of its computer systems that held Federal employee personnel records and security clearance information. The personal information of approximately 26 million current and former Federal employees, contractors, job applicants, and family members was stolen during these breaches.²³ Undoubtedly, many OPM resources (people and money) were diverted from other mission-related purposes to respond to these data breaches. The effect that these data breaches may have on seemingly unrelated OPM programs and operations, however, remains unknown. For example, if large numbers of employees fail to respond to future administrations of OPM's annual Federal Employee Viewpoint Survey—either in fear of their responses being compromised or because they are disillusioned by the way OPM handled their personal or security clearance data—conclusions drawn from that survey may become less reliable. Also, should the data breach adversely affect policymaker and stakeholder perceptions of OPM's competence or credibility, it may hinder OPM's ability to successfully propose and implement changes to Governmentwide human resources policy.

OPM Leadership. In July 2015, OPM Director Katherine Archuleta resigned.²⁴ Since her resignation, OPM has been led by Acting Director, Beth F. Cobert, who has been nominated as the permanent OPM Director. OPM has not had a deputy director since 2011, as the Senate has not confirmed a nominee for that position.²⁵

¹⁹ 5 U.S.C. § 1206.

²⁰ 5 U.S.C. § 2301.

²¹ 5 U.S.C. § 2302.

²² This summary of OPM's most significant actions or initiatives focuses on those actions that have the most potential to affect one or more of the MSPs or PPPs, rather than serving as a comprehensive digest of OPM activities. In addition to its Federal human capital management policymaking role, OPM also is assigned functions that do not relate to MSPs or PPPs (such as its responsibilities under the Patient Protection and Affordable Care Act). OPM also provides services to Federal agencies that are not included in this review (such as conducting employee background investigations and processing retirement claims). If a significant OPM action was discussed in a previous MSPB Annual Report, and no significant changes have been made to those programs, our previous comments remain applicable. Therefore, this summary should be read in conjunction with previous MSPB reports of OPM's significant actions.

²³ Joe Davidson, "[New OPM Data Breach Numbers Leave Federal Employees Anguished, Outraged](#)," *The Washington Post*, July 9, 2015.

²⁴ Julie Hirschfeld Davis, "[Katherine Archuleta, Director of Personnel Agency, Resigns](#)," *The New York Times*, July 10, 2015.

²⁵ Lisa Rein and Joe Davidson, "[OPM Director Katherine Archuleta Resigns Under Pressure](#)," *The Washington Post*, July 10, 2015.

New Significant Actions of the U.S. Office of Personnel Management

Senior Executive Service Reform and Modernization

The objective of the *People and Culture* cross-agency priority (CAP) goal of the President's Management Agenda is to "[unlock] the full potential of the current Federal workforce and build the workforce we need tomorrow" through: creating a culture of excellence and engagement to enable higher performance; building a world-class Federal management team, starting with the Senior Executive Service (SES); and enabling agencies to hire the best talent from all segments of society.²⁶ OPM undertook a wide range of actions during FY 2015 to reform and modernize the SES in support of this cross-agency priority goal. Among these actions were:

White House Advisory Group on SES Reform. OPM, in partnership with OMB, coordinated and supported a White House SES Advisory Group composed of leaders from across the Federal Government. The advisory group was tasked to develop recommendations on SES reform for the President's consideration. The group has completed its work, and OPM and OMB are currently reviewing its recommendations.

White House Leadership Development Program. OPM provided support to OMB on the design and initial implementation of a new White House Leadership Development Program for aspiring members of the SES. Interviews were conducted during the fiscal year to select the first cohort of participants for the program.

SES Onboarding Framework. OPM created an enhanced and standardized agency [SES onboarding framework](#) that covers a full range of activities needed to support the orientation and performance of new executives, such as in-briefing, establishing and communicating performance expectations, development planning, and networking.²⁷ This new and improved onboarding framework will involve leading practices, shared information and resources, and cost-saving efficiencies so agencies can help new executives quickly and successfully assimilate into their organizations, achieve high performance, and effectively engage their employees. OPM intends to work with the eight pilot agencies as they implement the new framework in FY 2016 and share lessons learned and best practices with all Federal agencies.

SES Exit Survey. In March 2015, OPM released the initial results of a new Governmentwide SES Exit Survey that was hosted by OPM. The survey collects data regarding the circumstances of the departure of employees from the SES. It provides useful information to inform Federal agencies' recruitment, engagement, and retention of senior executives.²⁸

Situational Mentoring. OPM has established a Governmentwide Situational Mentoring Program for new and current executives. Situational mentoring is a short term discussion between executives, on a high impact issue, problem, challenge or opportunity. The purpose of the program is to provide advice and guidance that allows executives to appropriately address critical issues; enhance individual and organizational performance; and develop the Executive Core Qualification competencies.²⁹

²⁶ See the *People and Culture* cross-agency priority goal [overview](#) at performance.gov.

²⁷ See U.S. Office of Personnel Management, "SES Onboarding Enhanced Framework," available via www.opm.gov.

²⁸ See Katherine Archuleta memorandum for Chief Human Capital Officers, "[Release of the 2015 SES Exit Survey Governmentwide Report](#)," March 30, 2015.

²⁹ See Katherine Archuleta memorandum for Chief Human Capital Officers, "[Launch of the Governmentwide SES Situational Mentoring Program](#)," December 11, 2014.

Performance Management. In 2012, OPM and OMB announced the design and issuance of a basic SES performance appraisal system. The system was designed to improve Governmentwide performance management of the SES by providing a consistent and uniform framework for agencies to communicate expectations and evaluate the performance of SES members, particularly centering on the role and responsibility of SES members to achieve results through effective executive leadership. In September 2015, OPM issued final regulations implementing the basic SES performance appraisal system.³⁰ In addition to promoting greater consistency, the system is intended to promote greater clarity, transferability, and equity in the development of performance plans, the delivery of feedback, the derivation of ratings, and the link to compensation. The system also provides agencies with some flexibility and capability for customization to permit them to adapt the system to their particular needs.

Significance

As noted in an MSPB report on executive training and development,³¹ the SES was envisioned as a corps of executives who would possess a broad Government perspective and be capable of serving in multiple leadership positions across Government agencies. The purpose of the SES was “to ensure that the executive management of the Government of the United States is responsive to the needs, policies, and goals of the Nation and otherwise is of the highest quality.”³²

Decisions made by SES employees and the ways in which they manage other Federal employees can have broad implications. Approximately one-third of career senior executives manage more than 200 employees and approximately one-quarter are responsible for budgets that exceed 100 million dollars.³³ Members of the SES affect not only their agency’s capacity for carrying out its mission and generating appropriate products and services for the American public, but also shape the perceptions of their agency’s value by their workforce, the public, Congress, and the White House.³⁴

High performing career senior executives have effectively managed the budgets of massive programs, saved the Federal Government billions of dollars, made significant contributions to increasing national security, facilitated commerce, and helped create positive relationships with foreign countries, to name but a few accomplishments.³⁵ In contrast, poor leadership can result in mission failure, a demoralized workforce, tarnished agency reputation, and public distrust of the agency or Government as a whole.³⁶

Given the influence that SES employees have on achieving agency missions and managing the Federal workforce, it is vitally important that the processes used to hire, train, reward, and manage these employees be robust and effective. In maintaining and improving these processes, OPM should continue to work with representatives of the SES to ensure their needs are met. Additionally, the importance of making the SES attractive to new entrants and improving the retention of current SES members only will increase in the coming years as over half of the current SES workforce will be eligible for retirement over the next three to five years.³⁷ OPM’s ongoing efforts to reform and modernize the SES indirectly relate to all the MSPs given the responsibility of the SES for leading employees and making personnel decisions.

³⁰ Managing Senior Executive Performance (Final rule), 80 Fed. Reg. 57,693 (September 25, 2015).

³¹ See U.S. Merit Systems Protection Board, *Training and Development for the Senior Executive Service: A Necessary Investment*, December 2015.

³² 5 U.S.C. § 3131.

³³ U.S. Office of Personnel Management, *Senior Executive Service Survey Results for Fiscal Year 2011*, May 2012, pp. 123-124.

³⁴ See U.S. Merit Systems Protection Board, *Training and Development for the Senior Executive Service: A Necessary Investment*, December 2015.

³⁵ Senior Executives Association, *2015 Presidential Distinguished Award Winner Accomplishments*.

³⁶ See U.S. Merit Systems Protection Board, *Training and Development for the Senior Executive Service: A Necessary Investment*, December 2015.

³⁷ U.S. Office of Personnel Management, *Senior Executive Service Exit Survey Results April 2015*, U.S. Office of Personnel Management, p. 7.

Recruitment, Engagement, Diversity, and Inclusion (REDI) Initiative

In March 2015, OPM released the REDI Roadmap. The REDI Roadmap is a data-centric approach that OPM developed to support the *People and Culture* cross-agency priority goal of the President's Management Agenda³⁸ that is intended to bring together all of the tools available to agencies to help them attract, develop, and retain a talented, engaged, and diverse workforce.³⁹

Recruitment. Specific recruitment-related initiatives under REDI include—

- Working with agencies to improve their processes, focusing on three specific areas: (1) laws, regulations, and merit system principles that may be confusing to managers; (2) OPM policies that may hinder effective hiring practices; and (3) potential agency misunderstandings of their authority to use existing hiring flexibilities;⁴⁰
- Planned improvements to USAJOBS.gov, the Governmentwide portal for job posting and application, to improve the experience of job seekers and to provide agencies with data on that experience to help them measure the success of their recruitment efforts, locate applicants for particular jobs, and better analyze resumes;
- Expanding partnerships with colleges, universities, and other entities to fill critical skills gaps with a diverse pool of applicants; and
- Improving the effectiveness of the Pathways programs and eliminating barriers to attracting diverse talent to the Senior Executive Service.

Engagement. The REDI Roadmap recognizes that engaged employees are more productive and effective than employees who are not engaged. OPM's goal is to support high levels of employee engagement by supporting the development of transformational agency leaders, providing opportunities for the enrichment of Federal employees' careers, and helping agencies measure and act on key drivers of employee engagement. Increasing Federal employee engagement is a central theme of the *People and Culture* CAP goal of the President's Management Agenda. A key indicator of that cross-agency goal is that, from 2015 to 2016, Federal employee engagement will have increased by three percentage points as measured by OPM's Federal Employee Viewpoint Survey.⁴¹

Diversity and Inclusion. Initiatives to promote diversity and inclusion are woven into the recruitment and engagement portions of the REDI Roadmap. These initiatives aim to address the under-representation of women, Hispanics, and people with disabilities in the Federal workforce. In March 2015, the Diversity and Inclusion in Government Council was established to provide a forum for improving senior leadership engagement and collaboration on strategic and operational diversity and inclusion priorities.⁴²

Significance

Recruitment. The REDI Roadmap provides for active OPM assistance to agencies in improving recruitment and streamlining their hiring practices. Efforts to improve Federal recruiting relate to MSP 1—recruiting from qualified individuals in an endeavor to achieve a workforce from all

³⁸ See *People and Culture* cross-agency priority goal [overview](#) at [performance.gov](#).

³⁹ U.S. Office of Personnel Management News Release, "[OPM Releases Recruitment, Engagement, Diversity, and Inclusion \(REDI\) Roadmap](#)," March 9, 2015. For more information on the REDI Roadmap, see the [OPM REDI website](#).

⁴⁰ Emily Kopp, "[OPM Banks on Data to Attract Younger, More Diverse Job Seekers](#)," Federal News Radio, March 9, 2015.

⁴¹ See Shaun Donovan, Beth Cobert, Katherine Archuleta, and Meg McLaughlin memorandum for Heads of Executive Departments and Agencies, "[Strengthening Employee Engagement and Organizational Performance](#)," December 23, 2014. Also see [People and Culture Cross Agency Priority Goal Quarterly Progress Update for FY 2015 Quarter 3](#), p. 4.

⁴² Katherine Archuleta, Beth Cobert, Meg McLaughlin, and Jenny Yang memorandum for Heads of Executive Departments and Agencies, "[Establishment of a Diversity and Inclusion in Government Council](#)," March 6, 2015.

segments of society, and selecting and advancing based on relative ability, knowledge, and skills after fair and open competition assuring that all receive equal opportunity—and OPM’s efforts to improve Federal agency understanding and use of the hiring system are constructive.

MSPB has two broad observations about improving the hiring system. Our first observation concerns balancing efficiency and speed in hiring with other important values. Most will agree that the processes used by agencies to hire new employees can be made more effective and efficient. However, any improvements made to hiring systems must operate within the framework established by the MSPs and PPPs. These principles and prohibitions impose both ethical and procedural constraints on Federal agencies to help ensure that Federal employees are hired and managed based on merit resulting in a Federal workforce free from undue political influence or favoritism. Policymakers, stakeholders, and agencies must understand that these constraints place limits on “streamlining” and the extent to which Federal hiring can or should mirror actual or perceived private sector practices.

Our second observation relates to the scope and results of current and previous efforts to reform Federal hiring. Improving hiring is a long-term effort and OPM has focused considerable attention to this issue over the years. Nevertheless, it appears that sustained and substantial progress remains elusive. For example, as of the third quarter in FY 2015,⁴³ hiring manager satisfaction had increased only marginally, to 61 percent from the baseline of 60 percent.⁴⁴ Enabling Federal agencies to routinely “[hire] the best talent”—and effectively balance the several values and goals of Federal hiring—may ultimately require more than improved understanding and implementation of existing policy. For example, the percentage of hiring managers who report active, personal participation in recruitment and outreach remains essentially unchanged from the baseline level of 43 percent. Clearly, greater involvement is desirable and achievable. However, many hiring managers may see little practical value in active recruitment under conditions that may include an overwhelming volume of applications, applicant assessments of insufficient rigor or reliability, and referral and selection rules that give little or no practical weight to a manager’s valuation of a candidate’s merits. As discussed in various MSPB reports on hiring, those conditions may be a consequence of Governmentwide *policy* as well as a consequence of imperfect understanding or *practice*.⁴⁵

Engagement. Continued OPM and agency attention to Federal employee engagement is appropriate. Previous MSPB research found a relationship between higher levels of employee engagement and improved Federal agency outcomes. Specifically, in agencies where more employees were more engaged better program results were produced, employees used less sick leave, fewer employees filed equal employment opportunity complaints, and there were fewer cases of workplace injury or illness.⁴⁶ Our subsequent research established the importance of effective performance management processes,⁴⁷ job design, and rewards in improving employee engagement.⁴⁸ Efforts to increase employee engagement are related to MSP 4, which envisions that employees will act in the public interest.

⁴³ See U.S. Merit Systems Protection Board, “The Federal Civil Service Hiring System is Out of Balance,” *Issues of Merit*, Fall 2015, and U.S. Merit Systems Protection Board, *Reforming Federal Hiring: Beyond Faster and Cheaper*, September 2006.

⁴⁴ “Cross Agency Priority Goal Quarterly Progress Update: People and Culture,” FY 2015 Quarter 3, accessed via www.performance.gov.

⁴⁵ See, for example, U.S. Merit Systems Protection Board, *The Impact of Recruitment Strategy on Fair and Open Competition for Federal Jobs*, January 2015, pp. 1 and 3-9; *Evaluating Job Applicants: The Role of Training and Experience in Hiring*, January 2014, pp. 27-34, and *Veteran Hiring in the Civil Service: Practices and Perceptions*, August 2014, pp. 5-12.

⁴⁶ U.S. Merit Systems Protection Board, *The Power of Federal Employee Engagement*, September 2008.

⁴⁷ U.S. Merit Systems Protection Board, *Managing for Engagement—Communication, Connection, and Courage*, July 2009.

⁴⁸ U.S. Merit Systems Protection Board, *The Motivating Potential of Job Characteristics and Rewards*, December 2012.

However, it is important that policymakers and stakeholders recognize the limits as well as the value of employee engagement and its measures. First, it is plausible that any management attention directed at improving the workplace, agency leadership, or employee morale should have some positive effect on agency operations. It remains unclear, however, what effect small improvements in Federal employee engagement as measured by the FEVS—such as the stated goal of a three percentage point increase—will have on agency outcomes. In addition, because OPM notes that the FEVS employee engagement index does not directly measure employee engagement—although it covers most, if not all, of the conditions likely to lead to employee engagement⁴⁹—it is uncertain that even large increases in that index would result in positive agency outcomes.

Second, although agency leaders can influence the work environment and other drivers of employee engagement, they are far from the only factor that affect an employee’s level of engagement as measured by instruments such as the FEVS. In the short term, in particular, indicators of employee satisfaction and engagement can be greatly affected by externally-directed changes in policy, budget, or structure. Also, it may be necessary for agency leaders to undertake, in the long-term public or agency interest, actions that are disruptive to both organizations and individuals.⁵⁰ In such situations, effective leadership could result in short-term decreases, rather than increases, in employee engagement. Finally, employees themselves must be active participants in their own engagement. For example, “pride in one’s work” ultimately requires an individual willing to produce outstanding results and a personal understanding of the importance of those results to the American people.⁵¹ For these reasons, although executives should be accountable for efficient and effective use of the workforce and for taking steps to understand and sustain employee engagement, it appears counterproductive to hold agencies or individual executives accountable for a particular increase (or decrease) in any measure of employee engagement, regardless of its source.

Diversity and inclusion. Efforts to improve diversity and inclusion in the Federal workplace relate to MSP 2, requiring fair and equitable treatment of employees, and MSP 8, protecting employees against arbitrary action, personal favoritism, or coercion for partisan political purposes. Continued attention to diversity and inclusion is supported by MSPB research, which documents that the vision of full inclusion of all employees, regardless of non-merit factors, is not yet fully achieved although substantial progress has been made.⁵²

Federal Supervisory and Managerial Framework and Guidance

In September 2015, OPM issued the Federal Supervisory and Managerial Frameworks and Guidance.⁵³ The guidance provides direction on developing individuals in supervisory, managerial, and executive positions, as well as employees whom agencies identify as potential candidates for such leadership positions. OPM’s guidance includes mandatory and recommended training on leadership competencies and human resources technical knowledge. The guidance also includes the required and refresher training mandated for all supervisors and managers.

⁴⁹ See for example, U.S. Office of Personnel Management, [2012 Federal Employee Viewpoint Survey Results Governmentwide Management Report](#), p. 12.

⁵⁰ See U.S. Merit Systems Protection Board, [Managing Public Employees in the Public Interest](#), January 2013, pp. 15-17, for discussion of the perceived necessity for Federal leaders to make difficult or potentially controversial decisions such as eliminate obsolete or unnecessary functions and positions.

⁵¹ Pride in one’s work is almost universally recognized as an indicator or outcome of employee engagement. See, for example, U.S. Government Accountability Office, [“Federal Workforce: Preliminary Observations on Strengthening Employee Engagement During Challenging Times,”](#) GAO-15-529T, April 16, 2015, and U.S. Merit Systems Protection Board, [The Power of Federal Employee Engagement](#), September 2008.

⁵² See, for example, U.S. Merit Systems Protection Board, [Fair & Equitable Treatment: Progress Made and Challenges Remaining](#), December 2009; [Preserving the Integrity of the Federal Merit Systems: Understanding and Addressing Perceptions of Favoritism](#), December 2013; and [Sexual Orientation and the Federal Workplace: Policy & Perception](#), May 2014.

⁵³ Mark Reinhold memorandum for Human Resources Directors, “Federal Supervisory and Managerial Frameworks and Guidance,” September 28, 2015.

OPM collaborated with the Federal Chief Learning Officers Council and the Interagency Training Work Group to develop the frameworks. This new issuance updates the Federal Supervisory Training Framework released in 2012 and includes OPM-developed definitions, learning objectives, and evaluation materials to assist agencies in evaluating the effectiveness of their supervisory and managerial development programs.

Significance

In our 2008 report, *A Call To Action: Improving First-Level Supervision of Federal Employees*, we noted that Federal supervisors need substantially more training and development.⁵⁴ Many new supervisors do not receive the training and development opportunities they need to understand the agency's expectations for supervisors and to manage their employees effectively. At that time, less than two-thirds of supervisors said that they received training prior to or during their first year as a supervisor. Of those who received training, almost half (48 percent) received one week or less.

The recommendations of that report included that OPM provide guidance to assist agencies in using competencies as a basis for supervisory selection and development. We also suggested that OPM provide additional guidance to help agencies make practical use of these competencies, such as (1) operational definitions—descriptions of how each competency is applied at the first level of supervision; (2) behavioral examples for different levels of proficiency; and (3) options for assessment and development.

OPM's new framework will undoubtedly assist agencies to better prepare their supervisors, or current and aspiring supervisors prepare themselves, for their crucial role in the workplace. Federal supervisors are the nexus between Government policy and action, as well as the link between management and employees. They ensure that the decisions made by the President and Congress are implemented through the information and services that employees provide to the American public. Because they have direct and frequent contact with employees, first-level supervisors can have a stronger, more immediate impact on employee performance and productivity than higher-level managers.⁵⁵

Of particular significance for this review is that training on the MSPs and PPPs is included as a topic of training required for new supervisors. Although the vast majority of Federal supervisors claim familiarity with the MSPs (89 percent) and the PPPs (92 percent),⁵⁶ agency human resources management (HRM) staff report somewhat less confidence in supervisors' familiarity with the PPPs and MSPs. Only 50 percent of HRM staff believe supervisors and managers are trained on the PPPs to a great extent and 16 percent said supervisors and managers have little or no training on the PPPs. Forty-six percent of HRM staff believe supervisors and managers are trained to a great extent on MSPs, and 18 percent had little or no MSP training.⁵⁷

Although improved training of Federal supervisors is necessary and welcome, Federal agencies should recognize the limitations of training. Merely attending training courses does not guarantee that employees have acquired the competencies those courses purport to impart. Additionally, some competencies needed to excel as a Federal supervisor may not be well-suited to development

⁵⁴ U.S. Merit Systems Protection Board, *A Call to Action: Improving First-Level Supervision of Federal Employees*, May 2010, p. ii.

⁵⁵ U.S. Merit Systems Protection Board, *A Call to Action: Improving First-Level Supervision of Federal Employees*, May 2010, p. 1.

⁵⁶ U.S. Merit Systems Protection Board, *Preserving the Integrity of the Federal Merit Systems: Understanding and Addressing Perceptions of Favoritism*, December 2013, p. 34.

⁵⁷ U.S. Merit Systems Protection Board, *The Impact of Recruitment Strategy on Fair and Open Competition for Federal Jobs*, January 2015, p. 37.

through training.⁵⁸ Accordingly, Federal agencies should maintain sound programs for selecting supervisors and take appropriate action when a supervisor is unable or unwilling to adequately carry out supervisory responsibilities.

MSP 7 states that employees should be provided effective education and training in cases where better organizational and individual performance would result. As noted, MSPB research documents both the importance of effective supervisors to Federal agency performance and the need to strengthen supervisory training.

OPM Significant Actions Underway or Completed

This section lists selected OPM significant actions discussed in previous MSPB Annual Reports that were completed or remained underway in FY 2015. This year's report does not discuss these actions in detail because further action or results are pending or the intent and significance of the final action is essentially unchanged from the (previously reviewed) proposed action. The table below lists the action, its current status, and the previous MSPB Annual Report which discussed the action.

OPM Action	2015 Status	Year Discussed
Designation of national security positions	OPM issued final regulations on June 5, 2015. ⁵⁹	2013
Governmentwide strategy on gender pay equality	OPM transmitted new guidance and summarized recent activities related to commitments made in the Governmentwide strategy. ⁶⁰	2014

⁵⁸ U.S. Merit Systems Protection Board, [Making the Right Connections: Targeting the Best Competencies for Training](#), February 2011.

⁵⁹ Designation of National Security Positions in the Competitive Service, and Related Matters (Final rule), 80 Fed. Reg. 32,244 (June 5, 2015).

⁶⁰ Beth F. Cobert memorandum for Chief Human Capital Officers, "[Additional Guidance on Advancing Pay Equality in the Federal Government](#)," July 30, 2015.

FINANCIAL SUMMARY

Fiscal Year 2015 Financial Summary⁶¹

as of
September 30, 2015
(dollars in thousands)

FY 15 Appropriations

FY 2015 Appropriation	\$ 42,740
Civil Service Retirement and Disability Trust Fund	2,345
Total	\$ 45,085

Obligations Charged to FY 2015 Funds

Personnel Compensation	\$ 22,954
Personnel Benefits	6,363
Transportation of Things	34
Travel of Persons	280
Rents, Communications and Utilities	4,225
Printing and Reproduction	50
Other Services	2,383
Supplies and Materials	114
Equipment/Lease Improvements	935
Reimbursable Obligations	2,345
Total	\$ 39,683

⁶¹ This summary shows financial activity (appropriations and obligations by category) for FY 2015. Additional Financial Information is available in the FY 2015 [Annual Financial Report](#) available on our website.

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LIST OF ABBREVIATIONS AND ACRONYMS

AC	Air conditioning
ADA	Americans with Disabilities Act
ADR	Alternative Dispute Resolution
AJ	Administrative Judge
APR-APP	Annual Performance Report and Annual Performance Plan
CB	Clerk of the Board
CBPO	Customs and Border Protection
CEU	Continuing Education Units
CLE	Continuing Legal Education
CMS/LM	Case Management System/Law Manager
COOP	Continuity of Operations Plan
CSC	Civil Service Commission
CSRA	Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111
CSRS	Civil Service Retirement System
DCMA	Defense Contract Management Agency
DoDI	Department of Defense Instruction
DMS	Document Management System
DOD	Department of Defense
DOI	Department of Interior
DOL	Department of Labor
DWOP	Dismissal Without Prejudice
ED	Executive Director
EEO	Equal Employment Opportunity
EEOC	Equal Employment Opportunity Commission
EVS	Federal Employee Viewpoint Survey
FECA	Federal Employee's Compensation Act
FERS	Federal Employees' Retirement System
FEVS	Federal Employee Viewpoint Survey
FLRA	Federal Labor Relations Authority
FRCP	Federal Rules of Civil Procedure
FTE	Full Time Equivalent
FY	Fiscal Year
GAO	Government Accountability Office
GC	General Counsel
GPRAMA	Government Performance and Results Act Modernization Act of 2010
GS	General Schedule
GSA	General Services Administration
HQ	Headquarters
IoM	Issues of Merit
IRA	Individual Right of Action
IS	Internal Survey
IT	Information Technology
LGBT	Lesbian, Gay, Bisexual, and Transgender
MAP	Mediation Appeals Program
MPS	Merit Principles Survey
MSP	Merit System Principles
NDAA	National Defense Authorization Act

OAA	Otherwise Appealable Action
OEEEO	Office of Equal Employment Opportunity
OGE	Office of Government Ethics
OMB	Office of Management and Budget
OPM	Office of Personnel Management
OSC	Office of Special Counsel
PDA	Pregnancy Discrimination Act
PFE	Petition for Enforcement
PFR	Petition for Review
PIO	Performance Improvement Officer
PPP	Prohibited Personnel Practices
RFI	Request for Information
RFQ	Request for Quote
RIF	Reduction-In-Force
SES	Senior Executive Service
SLA	Service Level Agreement
STSO	Supervisory Transportation Security Officer
TBD	To be determined
TSA	Transportation Security Administration
TSO	Transportation Security Officer
USDA	Department of Agriculture
USERRA	Uniformed Services Employment and Reemployment Rights Act
USPS	U.S. Postal Service
VA	Veterans Affairs
VERA	Voluntary Early Retirement Authority
VSIP	Voluntary Separation Incentive Plan
VTC	Virtual Teleconference
WB	Whistleblower
WPA	Whistleblower Protection Act
WPEA	Whistleblower Protection Enhancement Act of 2012



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